

Being Apart From Reasons:

A Study on the Role of Reasons in Public and Private Moral
Decision-Making

by Cláudio Fortunato Michelin Junior

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The candidate states that this thesis was composed by the himself and that it is the candidate's own work.

This thesis is an attempt to restore the employment of reasons to its rightful place as a morally valuable decision-making method. In order to do so, arguments are provided that aim at proving that there are other decision-making methods which are allowed and, sometimes, required by morals, which are not reasoning. That would only be true if there are substantive moral reasons which apply to the decision-making process through which an action was brought about, so that two actions that only differ in that they were brought about in different ways might be considered to be different sorts of action when viewed from a moral point of view. Those arguments explain how it is possible to conceive a richer morality of decision-making processes that has a place for, but is not reduced to, the use of reasons. In order to restore the employment of reasons to its rightful place, arguments are also provided to prove that *public* agents are always required to reason comprehensively (instead of, e.g., following their inclinations or reasoning from an incomplete set of reasons). Many contemporary philosophers attempted to justify constraints to the employment of reasons by public agents, so that public agents should not be allowed to use all sorts of reasons in the process of deciding what to do. Some reasons are said to be excluded *by kind* from the set of reasons available to them. In order to conclude that public agents should decide from a complete set of reasons (i.e. from a set of reasons from which no reason was excluded by kind), the author deals with three contemporary attempts to, directly or indirectly, justify the exclusion by kind of some reasons from the decision-making of public agents, namely, the Neutralist Public Liberal justification for the insulation of the right from the good, Raz's theory of Legitimate Authority and, finally, Habermas's theory of law, as it was put forward in *Between Facts and Norms*.

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TABLE OF CONTENTS

INTRODUCTION 1

CHAPTER ONE: MORAL ACTION, REASON AND INCLINATION 11

- Antecedents of Action 12
- Theories of Mercy 19
- Causality and Moral Action 26
- Intensionality, Universals and Particulars 38
- The Value of a Moral Action and the Value of Moral Life 43
- Moral Certainty and the weight of one's own moral success 49
- A summary of the Argument 53

CHAPTER TWO: REASONING IN PUBLIC AND PRIVATE CONTEXTS 55

- Public Agents' Dirty Hands 56
- Conclusion 79
- Excursus on the Merciful actions performed in the exercise of public roles 80

CHAPTER THREE: NEUTRALIST PUBLIC LIBERALISM AND THE INSULATION OF THE RIGHT FROM THE GOOD 83

- Impartiality and Systematic priority 84
- The two Strategies to justify the absolute priority of the right over the good 92
- The Internal Connection Argument 95
- The Objectivity Argument 98
- Public Liberal Neutralism and the Critical Project 107
- Final Words 111

CHAPTER FOUR: LEGAL AND NON-LEGAL REASONS IN THE COMMON GROUND OF DELIBERATION 115

- Autonomy and Authority 116
- Pre-emption in Legal Reasoning 126
- Formal Reasons 144
- Conclusion 149

CHAPTER FIVE: THE PROCEDURAL VALUE OF LEGAL DECISION-MAKING AND THE INSULATION
BETWEEN LEGAL AND MORAL REASONS FOR ACTION 150

The Procedural Value of Legal Reasoning 151

Discourse Theory and the Procedural Value of Legal Theory 156

a) About whether or not Alexy's conception of legal reasoning as a pure procedure implies the
insulation of legal reasons from moral reasons 157

b) Habermas and the co-originality of law and morals 166

CONCLUSION 179

The Theses 179

The argument to prove the first thesis 180

The arguments for the second thesis 181

BIBLIOGRAPHY 186

Introduction

Much of the contemporary reflection on practical reasoning has been hostage to fear. On the one hand, there is the fear that moral agents' impulses and inclinations would lead them astray from the right path in life. As a result, inclinations and impulses have often been relegated to a role secondary to reasoning as a method of decision-making. On the other hand there is the fear that an overriding obligation to reason matters through is not enough of a restriction on the decision-making of certain kinds of public agents. Those agents should only have a limited set of reasons to choose from when it comes down to weighing reasons for action. Those two different, yet related, fears inspired theories of moral decision-making that tend to alienate the agent from her own decision-making process either by giving systematic priority to the value of *employing reasons* in order to decide what to do, or by putting reasoning in a straightjacket by limiting its possibilities from the outset. The various arguments presented in this thesis aim at restoring the employment of reasons to its rightful place in practical decision-making. Those arguments serve one (or more) of three specific purposes: they aim at explaining the limited reach of reasons, notably in private decision-making, at explaining why the employment of reasons should be the preferential method of decision-making by public agents of a certain sort and, finally, at explaining how particular reasons should interact in the decision-making of those public agents. Through those arguments I hope to be able to justify my claim that many contemporary theories of morality can be understood as being attempts to alienate the moral agent from some decision-making strategies and burdens. There are at least two ways in which this alienation between the moral agent and her decision-making manifests itself in contemporary moral and political philosophy.

First, it is sometimes assumed that the morally correct process of decision-making is always to act on the conclusions the agent reaches after *reasoning* about whether or not an action is morally correct. Of course, the assumption might leave some room for excuses in those situations in which thorough reasoning is not empirically possible, as when the agent has to decide complex matters urgently. Under those less-than-ideal conditions, other methods of decision-making (e.g. acting from one's inclinations) might play a role in helping agents correctly to decide what to do. However, whenever the necessary conditions for comprehensive reasoning are present, the agent would be morally obliged to reason in

order to decide what to do. As a result of this ill-advised assumption, the moral agent is alienated from a whole wealth of methods of decision-making that I claim are, under certain conditions, morally permissible or even, more controversially, morally compulsory.

Contrary to that, I believe that the substantive moral rules that apply to decision-making processes are rather more complex. The fact that so much of contemporary practical philosophy assumes that reasoning is always the best way to make decisions is at least partly due to the lack of a clear distinction between reasoning as a *way that leads* to the morally correct action and reasoning as a *means to know* what is the morally correct action. The failure to understand the distinction between those two modalities of reasoning processes blurs the perception of the peculiar moral rules that apply to the use of reasoning as a tool of moral decision-making. My claim that there is a complex relation between the morality of actions and the morality of decision-making methods is not to be confused with the much more familiar claim that the *rationality* (in the sense of means-end calculation¹) of decision-making is independent of the morality of the action to be performed. What is at stake is the *morality* of decision-making processes and their relation to the *morality* of the actions performed as a result of the decision-making processes. This complex relation is a recurring theme in many of the arguments presented below, notably in the first and the fourth chapters. However, the fact that there is a distinction between the morality of decision-making and the morality of actions does not imply that there is no relation between them. Indeed, I shall try to explain this connection in chapter four, in doing so, I expect to clarify the moral relevance of the distinction.

The alienation between the moral agent and her decision-making might take yet another form. Namely, it might take the form of an argument that tries to justify the thesis that some sorts of rational decision-making, notably public decision-making, should be regarded as ‘non-comprehensive’ or ‘non-plenary’. I use those expressions to refer to processes of decision-making in which the agent should not use all the reasons that could

¹ Pursuing this sort of ‘rationality’, means to engage into what Habermas ‘pragmatic discourse’ which, as he pointed out, is only *one sort* of practical discourse (see his *Between Facts and Norms* Translated by William Rehg, Cambridge: Polity Press, 1996, p. 151-168, see also his On the Pragmatic, the Ethical and the Moral Employments of Practical Reason in Habermas, Jürgen *Justification and Application: Remarks on Discourse Ethics* (Transl. by Ciaran P. Cronin) Cambridge/Mass: MIT Press, 1993, pp. 1-17.

settle the matter when deciding what she should do². A justification for adopting a ‘non-plenary’ reasoning method would have as its upshot that the moral agent is alienated from a certain kind of reason for action in particular instances of decision-making. Those who argue that non-plenary reasoning is justified believe that allowing those particular reasons to play a role in the agent’s reasoning process would be a moral mistake. Moral arguments that aim to justify non-plenary reasoning are attempts to explain why some sorts of reasons should be eliminated from the set of reasons which might guide the decision-making of public agents. If successful, those arguments would narrow the scope of public agents’ discretion. Although I recognise the need to devise limits to the discretion of public agents, I believe that eliminating reasons from their processes of decision-making is not a justifiable way to achieve that aim. Indeed, I shall object in the last three chapters to three important arguments put forward in order to justify the elimination of some sorts of reasons from the set of reasons available to public agents in their processes of decision-making.

Let me now briefly introduce the structure of the argument presented in this thesis. In doing so, I hope to be able to clarify the connections between the arguments presented in each of its chapters. The first chapter is an attempt to put together two insights often thought to be incompatible, namely, the idea that inclinations and traits of character are central to understand morality and the idea that all that is morally relevant is, in the last instance, reducible to norms. The reason why they are sometimes regarded as being incompatible is the fact that each insight is central to one of two important competing traditions in moral theory, to wit, virtue ethics and Kantianism. Attempts have been made to incorporate insights of each of those traditions in unified theories³. At least one of those attempts concerns the problem of what are the requirements for the rationality of particular instances of *decision-making*, namely, Klaus Günther’s account of discourses of application in rational decision-making⁴. Günther attempts to tackle the problem of the relation between the moral norm and its application to particular cases by introducing a

² I borrow the expression ‘plenary’ from Fairen Guillen’s classification of legal procedures in plenary (those in which all reasons applicable to the case can be taken into consideration by the judge) and summary (those in which only some reasons which are applicable to the case can be taken into consideration by the judge). See Fairen Guillén, Víctor *El juicio Ordinário y los Plenarios Rápidos* Barcelona: BOSCH, 1953, pp. 35 e ss.

³ As e.g. in Onora O’neill’s recent *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* Cambridge: Cambridge University Press, 1996.

distinction between, and explaining the relation that links, discourses of justification and discourses of application. But it is important to bear in mind that, in spite of this similarity between my argument and Günther's, they centre in different problems. In the first chapter of this thesis, I attempt to present and partly justify an unified theory of *when moral agents have an obligation to reason before acting*, which is a fundamental part of a moral theory of decision-making. Günther's argument supposes that one is *already engaged* in practical reasoning, trying rationally to apply rules to particular cases.

In my first chapter, I argue that there is one particular sort of argument which could justify an agent not to reason before acting, even under the assumption that reasoning is the best available method for grounding moral beliefs. I use the recent debate on the nature of mercy as a testbed for my arguments about the existence of other morally sound strategies of decision-making besides the employment of reasons. In contrast to the theories of mercy put forward by N. E. Simmonds and Jeffrey Murphy, I propose that the difference between mercy and justice is best understood if one focuses on the distinction between two different decision-making processes: while merciful actions spring from inclinations, justice is often (if not always) a result of reasoned judgement. After using the debate on mercy in order to introduce my conception of the moral importance of the choice between different methods of decision-making, mercy leaves the centre of the stage to become simply a running example, my most immediate concern being to defend against a number of possible objections my thesis that not only the action performed but also the choice of the decision-making method that leads to the performance of the action is morally relevant. In the process of defending my thesis against those objections I shall have to introduce some qualifications to it and, in doing so, I hope that it will become clear just *which sort* of argument is needed in order to fully justify the thesis. The central feature of that argument is that it connects the relaxing of the apparently overriding obligation to reason before acting with a particular idea of a morally successful life. However, I shall not offer a complete argument for justifying it. The reason why a complete argument is not needed in the context of this thesis is the fact that my main concern is public decision-making and, as I shall prove in the second chapter, the *sort* of argument identified in chapter one as being capable (if valid) to justify that moral agents do not reason before acting would not be applicable to contexts of public decision-making.

⁴ Günther, Klaus *The Sense of Appropriateness: Application Discourses in Morality and Law*

But my claim that my main concern in this thesis is to investigate processes of public decision-making raises the problem of why I bother writing my first chapter about decision-making which is not specifically public. Why do I attempt to prove that reasoning is not necessarily the recommended method of decision-making *tout court*? There are two independent reasons why my first chapter is relevant. The first reason is that there are two ways in which the chapters of this thesis relate to one another: they relate to one another as parts of a general argument about decision-making by public agents, but they also relate to each other as attempts to answer the same problem in different contexts. I shall come back to this point soon. The second reason that justifies the argument in the first chapter is the fact that an oversimplified conception of general moral decision-making can only generate an oversimplified conception of decision-making in public contexts. This oversimplified version has at least two major shortcomings: first, it makes it impossible to conceive of what I believe to be the essentially tragic nature of public agency but, secondly, and more importantly, it leaves open (because it considers trivial) the problem of *why* reasoning is always necessary in public contexts. And because it is not clear *why* one should always reason in public contexts, it will also not be clear *why* not any sort of reasoning performed by public agents would do. But let me now return to the presentation of my argument.

I introduce my argument in the second chapter by trying to identify the philosophical insight behind the not-uncommon impression that there is a discontinuity between public and private morality, the problem that is often referred to as ‘Machiavelli’s question’. Regardless of whether or not there is indeed a discontinuity between public and private moralities where *actions* are concerned I believe there are good reasons to believe that there is indeed a difference between public and private contexts that concerns the decision-making processes that are acceptable in each context. Public agents should, whenever possible, act on reasons, while private agents might be justified not to reason even if the ideal conditions for reasoning are present. In short the main reason why private contexts differ from public contexts, in this respect, is the fact that agent-relative reasons are not normally good grounds for public action. The value of moral self-improvement which, as we will have seen in the first chapter, is necessarily the ground for a relaxation of the obligation not to reason in particular instances, is a typical case of an agent-relative reason for action. For that reason, the grounds for relaxing the obligation to reason moral matters

through (i.e. self-improvement) would very seldom be available in public contexts. From that it is possible to derive an (admittedly defeasible) prudential rule that says that reasoning in public contexts is always required. But from that defeasible prudential principle it is possible to derive, or so I will argue in the second chapter, that public agents' decision-making processes are morally right only if they revolve around the employment of reasons.

Having established the moral difference between the morality of public decision-making and the morality of decision-making in general and having argued for the moral obligation of public agents to reason before deciding, I move on to consider *how* this reasoning should be performed by public agents. Public agents, as we will see, are morally obliged to try their best to *be sure* about the rights and wrongs of each particular case. But that does not settle the question of the *kind* or *style* of reasoning process that is most likely to bring the public agent to hold the right opinion about what is the best thing to do in the instant case. More specifically, it is not clear whether public agents should reason comprehensively (weighing up all applicable reasons) or, alternatively, whether some reasons that are applicable to the case (that is, whose scope includes the case) should not be included from the very process of decision-making by public agents. There are three independent but, I shall claim, structurally similar arguments that aim at proving that comprehensive reasoning by public agents isn't *always more likely* to bring the agent to hold the right opinions about the rights and wrongs of the particular case. Those arguments attempt to justify the second form of alienation between the moral agent and her decision-making processes mentioned above, to wit, the alienation between the agent (the public agent, for our purposes) and some reasons which are applicable to the instant case.

I believe that those arguments have a common weakness, i.e., there is something fundamentally flawed with the argumentative strategy which is common to them. In order to justify that some moral reasons are to be excluded from public agents' decision-making processes, those theories must be able to exclude reasons *from the start*. Those reasons excluded are not even to be allowed into the weighing process. As Raz phrases it, they are not excluded by *weight*, but by *kind*. In order to justify such priority, those theories cannot simply postulate that some moral reasons are able to exclude other reasons by kind, for there are very strong reasons to believe (as we shall see in chapter three) that no systematic priority between moral reasons can be justified *from within* the moral point of view. In order to justify that exclusion by kind, those arguments appeal to a metalevel *beyond*

morality where they suppose they can find reasons (of a different kind to moral reasons) to justify the systematic priority of some moral reasons. I shall raise a number of objections to each of those arguments, but a common thread that connects those objections is the idea that each of those arguments, if not invalid, is either insufficient to ground any sort of exclusion of reasons by kind from public decision-making, or it is trivial and, as a consequence, not much help for moral decision makers. Let me now briefly introduce each of those arguments.

In the third chapter the target is the neutralist liberal claim that reasons concerning the good, as opposed to reasons concerning the right, have no function in public decision-making. Neutralist liberals, committed as they are to the thesis that public agents should be absolutely impartial among all conceptions of the good, try to restrict the reasons public agents can appeal to in particular instances of decision-making to those reasons that they call reasons for the *right*. That means that, in public contexts, reasons concerning the right have systematic priority over reasons concerning the good. My first step is to show what is wrong with the idea of systematic priority (or 'indexical order', in Rawls's terms) between moral reasons. I then go on to address more sophisticated versions of the liberal neutralist argument that incorporate answers to the sort of objection I will have raised against systematic priority in morals. In one of those versions the systematic priority of the right is based on a conceptual argument that makes autonomy *conceptually prior* to any other value; in the second systematic priority is said to stem from the non-moral value of *objectivity*; the latter is often complemented by another argument (which is sometimes presented independently from the argument of objectivity) according to which reasons concerning the right derive from the structure of reason itself, while reasons for the good might derive from other sources. In each of those arguments the strategy mentioned above in which systematic priority between moral reasons is justified by means of appealing to non-moral reasons can be perceived. I shall argue in chapter three that each of them fails.

The fourth chapter will deal with Raz's attempt to justify that some reasons be excluded altogether from legal (and, paradigmatically, judicial) decision-making. I shall introduce the chapter by analysing the bearing of authority on practical decision-making. I then move on to consider Raz's 'normal justification thesis', which aims at grounding a second thesis that Raz dubs the 'pre-emption thesis'. According to the pre-emption thesis, legitimate authority has the power to exclude certain reasons from the public agents' decision-making processes. The normal justification thesis explains why this exclusion is morally justified.

In order to insulate legal from moral reasons, Raz postulates an insulation between first and second-order reasons. First-order reasons are reasons for or against performing a particular action, while second-order reasons are reasons for or against acting for a particular reason. Norms issued by legitimate authority are not only first-order reasons but also second-order reasons that justify the exclusion of moral reasons by kind from processes of decision-making. I then argue that first and second-order reasons cannot be insulated from one another in processes of decision-making (for reasons fully articulated in chapter four). If that is correct, first-order moral reasons can defeat the second-order reasons that justify their exclusion and the insulation is not airtight. If this insulation is not airtight, moral reasons are not excluded from legal decision-making (by judges or whoever else) and the resulting model of legal reasoning can still be considered to be plenary. Raz's normal justification thesis is another example of the argumentative strategy mentioned above. As we shall see, in its strongest interpretation, the thesis does indeed succeed in creating a connection between a metalevel and the plain level of first-order reasons (and no weaker interpretation would be able to do that job). However the price to pay for this success is high: in this strong interpretation the normal justification thesis becomes trivial and does not help decision makers to justify the insulation of moral reasons from formal reasons.

In the fifth chapter I deal with yet another argument that concerns primarily the interaction between legal and moral reasons. There I deal with arguments that try to establish the value of acting on legal reasons by means of justifying the particular procedures through which legal reasons are (or should be) brought about. I introduce the chapter by identifying the kinds of arguments for the procedural value of law that could potentially justify non-plenary reasoning by public agents and I do so with the help of Rawls's distinction between pure, perfect and imperfect procedural value. Having identified arguments for pure procedural value as the ones that were not yet covered by the arguments in the preceding chapter, I move on to analyse the possibility of grounding non-plenary reasoning by the discourse theoretical justification for the pure procedural value of law. I first deal with Alexy's theory of legal argumentation and then move on to analyse Habermas's argument as presented in *Between Facts and Norms*. I conclude that neither is able to justify non-plenary moral reasoning either by public agents or by those subject to the law. Again, here we find an argument that tries to ground the systematic priority of some reasons (those that result from a democratic procedure set up according to the democratic

principle) over other reasons and, once again, the argument relies on an extra-moral value. Habermas appeals to an argument similar to the liberal argument concerning the demands of *reason itself*. That will give me a chance to return to the final theme of chapter three, and to examine whether or not Habermas's corrections to the liberal/Kantian conception of rationality (e.g. reason as dialogic, instead of monologic) would help to justify the use of non-moral categories to justify systematic priority between moral reasons.

To sum up: in the first chapter, it is said that there is a kind of argument that, if correct, would be able to justify that one is not obliged to reason, even under ideal conditions for doing so; in chapter two this argument is said not to be applicable to certain sorts of public agents who, therefore, must always decide by means of moral reasoning; in chapter three, the liberal neutralist attempt to justify that public agents' reasoning should be non-plenary is objected to; in chapter four, Raz's attempt to insulate legal from moral reasons is objected to; in chapter five, proceduralist accounts of the value of legal reasons, notably those put forward by discourse theory, are said not to be able to ground the exclusion of moral reasons from neither public nor private decision-making processes.

From this outline of the thesis I hope to have made more clear one way in which the argument of each chapter relates to the argument of each other chapter. To put it schematically, the conclusions of the first chapter are assumed as part of the argument of the second chapter, whose conclusions, in turn, are assumed by each of the three last chapters. But there is another, perhaps less obvious, way in which all those chapters relate to each other. Each of them constitutes a separate answer to a problem proposed by Bankowski both to the students of his course on *Justice Ethics and Law* at the University of Edinburgh in the summer term of 1996/7 and in his *Don't Think about it: Legality and Legalism*. The question he asks is whether or not there are 'cases, without indulging in conservative notions of fitness to rule and social place, where not thinking about what to do is the right thing to do?'⁵ In the process of trying to answer that question in different contexts of decision-making, I realised that both my understanding of the question and my way to answer it are not entirely coincident with Bankowski's. I hope that the differences in Bankowski's approach and mine will become clear in what follows (some of those differences are explicitly addressed in chapter four). Regardless of those differences, I still

⁵ Bankowski, Zenon *Don't Think About It: Legalism and Legality* in Karlsson et al *Law, Justice and the State* Berlin: Dunker & Humblot, 1993. p. 52

regard my argument as engaged in the same general project as Bankowski's. That is the project of finding the appropriate place for reasons in a morally (and otherwise) good life.

Before moving on to the first chapter, however, I would like to make two methodological points that might be useful for the correct understanding of all the arguments presented in this thesis. First, the reader would notice that my use of insights from other areas of philosophy to resolve what I believe to be moral problems concerning the ethics of decision-making is parsimonious. I use epistemological arguments in the first chapter, but the argument is only relevant to help proving that a given moral conception of the morality of decision-making is *feasible*. Such an economic use of insights imported from other branches of philosophy in order to resolve a moral problem is a consequence of my belief that those insights are only instrumental in the resolution of substantive moral problems⁶. I believe that comprehensive moral theory that is derived from, say, epistemology, or the metaphysics of mind, is bound to be incomplete and demand substantive moral arguments in order to resolve substantive moral problems.

For much the same reasons, I am suspicious of any form of metaphysics of morals. There seems to be little to be gained from dividing moral argument into two different sorts of investigations, one about the principles of practical reason from which particular practical reasons are derived (e.g. the categorical imperative) and one about the problems that follow from the need to apply those norms to particular cases. Without denying that in some situations those arguments might be useful, I believe that very few cases of moral disagreement can be settled by means of resorting to principles of a metaphysics of morals. In what follows, those arguments will also be employed very parsimoniously, and indeed two arguments of this kind are under attack respectively in chapters three and five.

⁶ On the relation between moral theory and other branches of philosophy, see Rawls, John The independence of Moral Theory in Freeman, Samuel *Collected Papers* Cambridge/MA: Harvard University Press, 1999, 286-302.

Chapter One: Moral action, Reason and Inclination

You appear to me, Mr. Darcy, to allow nothing for the influence of friendship and affection. A regard for the requester would often make one readily yield to a request, without waiting for arguments to reason one into it. ...[S]hould you think ill of that person for complying with the desire, without wanting to be argued into it?

From Jane Austen's *Pride and Prejudice*

The present chapter's aims are twofold: the chapter aims, first, at making more attractive the thesis that moral agents don't have an overriding obligation to act based on moral beliefs arrived at through reasoning and, second, at demonstrating how a substantive argument for this thesis would be able to defeat the argument that if reasoning brings about more certainty about what is morally correct, it follows that one should always reason before acting. To be sure, the thesis that I want to make more attractive is not simply that in some circumstances there are good *excuses* not to reason before acting (lack of time or of serenity, for instance), but that there are circumstances in which, although the ideal conditions for reasoning are present, there is no moral obligation to perform reasoning. The way in which I expect to make the thesis that there is no moral obligation to reason more attractive is to defend a conception of morality that is a necessary condition for the thesis to be true against objections which have been raised against it. And the way in which I want to demonstrate how a substantive argument could defeat the argument of moral certainty is, first, to identify which sort of argument this substantive argument would have to be and then show how this sort of argument can defeat arguments based on moral certainty.

In the first part of the chapter, I present the thesis that morally correct action can be preceded by events other than moral judgement, paradigmatically by the excitement of settled dispositions (I shall call those actions 'particularity-dependent' in what follows). I start by introducing the notion of *antecedents of actions* and then I move on to present Simmonds's argument for the connection between mercy and judgement. The reason why I introduce Simmonds argument is the fact that I take mercy to be a paradigmatic case of a particularity-dependent action. Merciful actions will work as a testbed for my thesis that there are certain

kinds of moral action that should be conceived as *reactions* that follow from the agent having been *affected* by certain states of affairs. In Simmonds' conception of merciful actions, they must always be preceded by judgement. Judgement is an *active* sort of perception (different from the passive perception of having been *affected*) and that seems to go directly against my own conception of mercy as a particularity-dependent action. Given the sharp contrast between the way in which I conceive of merciful actions and the way Simmonds conceives of merciful actions, the best way to get my argument across is to present it in the form of a dialogue with Simmonds's main argument and some of its possible developments. In arguing my case, I first defend that human action in general and moral action particularly, can be *caused*. I then move on to deal with the epistemological argument put forward by Simmonds according to which the perception of states of affairs is necessarily propositional (constitutes a judgement), from which it would follow that even if action can be caused, in order for causes to be perceived by the mind, they have to take the form of propositions about universal features of present states of affair. I shall object also to this epistemological argument in order to show how the way through which some moral actions are brought about can be explained in purely causal terms. If my objections work, the most important arguments against the thesis that the excitement of dispositions can work as an antecedent for moral action would have been disproved.

In the second part of the chapter I try to show a way to deal with the thesis that if reasoning increases certainty, it follows that one should always reason before acting. In order to show which kind of arguments would be needed to prove this argument to be invalid I shall explain in more detail what I mean by 'particularity-dependent actions' and why the distinction between particularity dependent actions and actions that spring from reasoning is morally relevant. That would lead me to some conclusions about *which sort* of substantive moral claim would have to be true in order to prove the argument from moral certainty to be invalid. In the final section, I try to show how those sorts of argument would be able to prove that the conditional 'if reasoning increases certainty, it follows that one should always reason before acting' is false.

Antecedents of Action

Let me introduce the notion of 'antecedents' of actions and distinguish it from related concepts such as the concept of intentionality through a comparison between moral reasoning, to which

the problems dealt with in this chapter are directly related, and legal reasoning. Although what I mean by the phrase 'antecedents of action' will be only be fully explained through the discussion of the relation between causes and actions below, it would be helpful to provide the reader with a preliminary notion of 'antecedents of actions' at this early stage. Antecedents of actions are certain sorts of causes from which actions spring. Within that category I include the excitement of dispositions by the perception of certain states of affairs as well as the excitement of a disposition towards duty that is excited by rational judgement. I believe I share this general conception of 'antecedents of actions' with MacIntyre, from whom I borrowed the expression¹. Later in this chapter I shall defend MacIntyre's insight that actions might be said to have causes by explaining which sorts of causal relation between antecedents of actions and actions are morally relevant and why. But let me introduce the notion of the antecedents of actions by referring to some widely accepted theoretical uses of the distinction between the antecedents of an action and the actions itself.

The relevance of the antecedents of an action for its conceptualisation would be, according to philosophers such as Kant, one of the safest criteria to distinguish legal reasoning from general moral reasoning. This I take to be at least part of the truth that lies behind the all-too-common insight that morals is somehow internal, while law is external². In legal practice as it is, antecedents of human action are normally unimportant in judging the legality of an action. Of course there are instances in which the antecedents of an action are relevant in passing legal judgement, as when the qualification of a murder as cold-blooded can make a difference to the legally appropriate punishment, but generally the particular way in which the action was brought about does not have to be considered in order for the action to be qualified as legally correct or incorrect. Intentions are more often relevant in judging someone's action legally correct, as when what is in question is the qualification of an act as murder or manslaughter. But also intentions are not necessarily relevant. The most common example of an action that could be considered legally correct regardless of the intention with which it was performed is a judicial decision.

¹ MacIntyre, Alasdair *The Antecedents of Action* in: *Against the Self- Images of the Age: Essays on Ideology and Philosophy*, London: Duckworth, 1971, pp. 191-210.

² In his *Concept of Law* Hart, identifies the voluntary character of moral action as part of what is contained in the insight of internality (see p. 178-179). Others have argued the opinion that the apparent insight contains no truth as, for instance, did Judith Shklar in *Legalism* (Cambridge/MS: Harvard University Press, 1964, pp. 43 ff.)

At the beginning of the century, American Legal Realists challenged the formalist view of how legal decisions are taken. Reasoning from rules is not the only way in which legal decisions are made, claimed the realists. They offered evidence for the claim that other factors such as political preferences, moods and prejudices are very often more determinant for the final legal decision than legal norms. Very often the decision seems to be formed before any piece of legal reasoning is carried through³. Moreover, they claimed, if the formalist method for legal decision-making is possible at all (doubt was expressed about this possibility), it is surely not the best way to bring about legal decisions.

In so arguing legal realists provided us with the last programmatic defence of the relevance of antecedents of actions and intentions in the theory of legal decision-making. A standard answer to this challenge for those who were keen on establishing some difference between legal and general decision-making was grounded on the difference between the way a decision was brought about (was 'discovered') and its justification. Wasserstrom sees the distinction between processes of discovery and justification as a difference between two *aspects* of the decision, which are brought to light by two different orders of questions one might ask about particular judicial decisions. As he puts it:

One kind of question asks about the manner in which a decision or conclusion was reached; the other inquires whether a given decision or conclusion is justifiable. That is to say, a person who examines a decision process may want to know about the factors that led to or produced the conclusion; he may also be interested in the manner in which the conclusion was to be justified⁴.

With this distinction in place, those who aimed at restoring the independence of legal decision-making could happily concede that legal decisions are discovered (taken, brought about) in many different ways. But the method of discovery, they would want to add, is not relevant for anyone to learn whether or not a decision is correct. In order to assess the decision's correctness, one has to investigate if there are good reasons that *justify* it. While a research on the process of discovery of legal decisions could be helpful in providing a sociological analysis of legal decision-making, perhaps formulating sociological norms that would help to predict

³ For a general view on many of the realist arguments, see Wasserstrom, Richard *The Judicial Decision: Toward a Theory of Legal Justification* Stanford: Stanford University Press, 1961, pp. 14 ff. See also Anderson, Bruce "Discovery" in *Legal Decision-making*, Dordrecht: Kluwer Academic Publishers, 1996, especially sections 1 and 2 of chapter I.

⁴ Wasserstrom, *The Judicial Decision*, cit., p. 25.

the behaviour of judges, this research would be irrelevant to decide whether a decision was legally correct or not. The justification of the decision is what matters to assess its correctness. The question of justification would seem to be much more relevant for legal theory and indeed, MacCormick once wrote that

[t]he process which is worth studying is the process of argumentation as a process of justification⁵ [although later he recognises that] [A]s a value judgement that is doubtless disputable...⁶

I shall not enter the debate of whether or not the distinction between discovery and justification can be easily imported from science to law. I would just like to point out that, although it is not clear why the process of discovery should *necessarily* be irrelevant to the correctness of legal decisions⁷, the distinction between the correctness of an action and the correctness of the procedure through which the action was brought about seems to be, at least *prima facie*, sound. The distinction between the morality of decision-making and the morality of actions, which I begin to explore in the present chapter, will be explained in more detail in chapter four. Let us now consider the case of moral reasoning.

Although intentionality is generally accepted as being a constitutive part of moral judgement, antecedents for action have fallen from the millenary grace they enjoyed amongst moral philosophers. As an instance of this, remember Judith Shklar's denial of inclinations as being morally relevant, followed by her saying that "[t]he typical moral act, moreover, involves appraising a situation and deciding what rules apply to it"⁸. As an instance of the opposite attitude, think of Aristotle's more elaborate account of the importance of moral actions' antecedents, which is supposed by the distinction between the continent⁹ (enkratic) and the virtuous¹⁰. A continent man knows what is right to do and acts according to this knowledge, but this is not what one should aim for as a moral agent. Continence is at best a stage in the process of becoming virtuous, for it may be that continence will bring about the right

⁵ MacCormick, Neil *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978, p. 15.

⁶ MacCormick, Neil *Legal Reasoning and Legal Theory*, cit., p.19.

⁷ For a more thorough analysis of the distinction between justification and application applied to legal contexts, see Anderson "Discovery" in *Legal Decision-making*, cit.

⁸ Shklar, Judith *Legalism*, cit., p. 61.

⁹ See *The Nicomachean Ethics* (1111 b14-15). Translated by Ross, David; Revised by Ackrill, J. L. and Urmson, J. O., Oxford: Oxford University Press, 1980, p. 53.

inclinations in someone's character. But only after those inclinations are settled dispositions of someone's character would it be possible to qualify the agent as morally praiseworthy. In L. A. Kosman's fine phrasing, for Aristotle, 'the good person is not simply one who behaves in a certain way, but one who behaves that way out of a certain character.'¹¹ For Aristotle, therefore, as for Plato before him, the way the action comes about (its antecedent) bears on the judgement about the agent's moral character. The distinction between the antecedent of an action and its intention is apparent in Aubanque's interpretation of Aristotle's use of the expression *exis prohairetikos*, as it appears in book two of the *Nicomachean Ethics*. According to Aubanque, the expression is used there as a definition of moral virtue, and could be translated as 'une disposition concernant l'intention'¹². Here it is clear how the disposition is *prior* to the intention. It follows that a judgement passed on an action comprehends a judgement on the intention with which the action was performed as well as a judgement on the possession by the agent of a 'disposition' to have such intention¹³. In other words, a judgement which is passed on a moral action is, at least in part, a judgement passed on the agent's character.

To show the connection between antecedents of actions and judgements of moral character and, in doing so, to reassert the moral relevance of the way actions come about, is the central concern of this chapter and all the partial arguments produced should be seen as parts of a more comprehensive argument aiming at proving precisely that. I shall try to do so by developing Kosman's suggestion that a virtuous character is one that combines certain active

¹⁰ For this interpretation of Aristotle, see MacIntyre, Alasdair *Whose Justice? Which Rationality?* London: Duckworth, 1988, p. 112; see also McDowell, John *Virtue and Reason in Mind, Value & Reality*, Cambridge/MA: Harvard University Press, 1998, p. 55.

¹¹ Kosman, L. A. *Being Properly Affected: Virtues and Feelings in Aristotle's Ethics* in Rorty, Amelie Oksenberg (ed.) *Essays on Aristotle's Ethics*, Berkeley: University of California Press, 1980, p. 103.

¹² Aubenque, Pierre *La Prudence chez Aristote* Paris: Presses Universitaires de France/Quatriges, 1963, p. 235.

¹³ Aristotle does not seem to give any relevance to the conceptual distinction between 'intention' and 'decision'. As Gauthier once pointed out, he uses the same word to refer to both concepts, *prohairesis* (see Gauthier, René-Antoine *La Morale d'Aristote* Paris: Presses Universitaires de France, p. 65). This distinction is better understood if we notice the conceptual distinction between 'intention' as used in the phrase 'to form an intention' (that is, to decide to do something) and 'intention' as a logical feature of the action (that is, intention in a Wittgensteinian sense). I shall come back to that distinction in what follows, but it is important to notice now that the conceptual difference between intention and decision has no implication to the Aristotelian thesis that antecedents (inclinations to intentions) and intentions are to be distinguished.

skills, that is to say, certain dispositions to act, with some passive skills, that is to say, certain dispositions to 'be affected' by certain events (what Kosman calls 'dispositions to feel')¹⁴.

The need for trying to make Aristotle's conception of the connection between antecedents of actions and judgements of moral character more attractive stems from the fact that it is far from being undisputed. As a matter of fact, most modern philosophers have either denied it or reconceived it so that the only relevant antecedent is a process of reasoning. Some versions of utilitarianism are a good example of the first attitude, while Kant is the paradigmatic example of the second. For utilitarians, as for most consequentialists¹⁵, states of affairs are the main object of moral judgement and, as a result, the way in which the state of affairs brought about is of no moral relevance¹⁶. *A fortiori*, it does not matter which decision-making method was used by the agent who brought about the desired state of affairs. As I have already anticipated, I shall be defending in this section the thesis according to which the antecedent of an action may be relevant for its moral qualification. Also I shall be defending that the way in which antecedents of actions are morally relevant is much more complex than Kant believed. In Kant's view, all action springing from inclinations, dispositions and, indeed, anything other than a reason cannot be conceived as morally correct. The actions of a good-natured agent who tends to do the right things because he is disposed to so act are not morally correct or at least, in a perhaps more charitable reading of Kant, are never as morally praiseworthy as the actions performed out of fidelity to reason. I shall come back to this later on in this chapter, but allow me now to clarify what is at stake here.

If the way through which actions are brought about were indeed relevant for their moral qualification, it would follow that two actions that are identical in all other morally relevant respects could be qualified from the moral standpoint as being of different kinds (even different kinds of morally *correct* action). It is important to underline that this question is

¹⁴ Kosman, L. A. *Being Properly Affected: Virtues and Feelings in Aristotle's Ethics*, passim.

¹⁵ This connection of consequentialism with states of affairs is highlighted by Bernard Williams in *Utilitarianism for & Against* Cambridge: Cambridge University Press, 1973, p. 83.

different from the question of whether or not *intention* is important to morally qualify human action. Two actions could be performed with the same intention yet they may have been brought about in different ways. Suppose I see a beggar on the pavement and I think of the reasons for and against helping him by giving him some money; after careful consideration I arrive at the conclusion that it is right to help him by giving money and, from my conclusion, my intention is formed and my action performed. Now compare it to the situation in which my seeing the beggar excites a disposition of helping beggars through giving alms, and so my intention is formed and my action performed. From the point of view of intention my action is the same, but in each case it was brought about in a different way.

The thesis in this chapter is simply that, under some conditions, reasoning is not necessarily the required antecedent of a moral action, even assuming that the empirical conditions for reasoning are present (time, serenity, etc). I would like also to explain the intuition that some ways in which behaviour is brought about are morally relevant while other ways are not. If I am right in that methods of decision-making are also regulated by moral reasons, I believe that it would be possible to approach some old moral problems in a new and more fruitful way. I shall use one of those problems, namely, the moral characterisation of mercy and its relations with other virtues as a guideline for the presentation of my argument in this chapter.

The theorisation of mercy has been the subject of many papers in the past few years. Not that writings about mercy and its relations with other virtues (notably justice) were uncommon amongst philosophers and theologians, but in the course of the last decades the further problem of deciding whether or not merciful actions have a place in the context of modern institutions, notably modern legal institutions, was added to the list of problems that a general theory of mercy would help to resolve. The new problem, nevertheless, has been often taken to be only an instance of a classical problem concerning mercy, namely, whether or not mercy is compatible with justice and judgement (the so called 'paradox of mercy'). The paradox arises when one tries to conceive an agent that always acts mercifully and who also always acts

¹⁶ In his *Kantian Consequentialism* (Oxford: Oxford University Press, 1996), David Cummiskey attempts to make consequentialism compatible with the need to maximise the conditions needed by rational agency. By doing so, Cummiskey attempts to build a sort of consequentialism that is premised on agency, and that might seem to contradict the idea that, for consequentialists, the way states of affairs come about doesn't matter. I shall deal with his conception of consequentialism in the second chapter. For now it suffices to notice that the increased concern with agency only sets a

justly. It is not surprising that the problem should first arise in Christian theology for which God is infinitely merciful and infinitely just. As St. Anselm puts it in the Proslogium IX:

What justice is it that gives him who merits eternal death everlasting life?
How, then, gracious Lord, good to the wicked, can you save the wicked, if
this is not just, and you do nothing that is not just?¹⁷

Notwithstanding the fact that the question concerning mercy and modern institutions was very often not recognised in its specificity, attempts were made to solve it through solving the old paradox of mercy. Theories of mercy were proposed as part of those attempts and in the next two sections I shall concentrate on the analysis and criticism of those general theories of mercy, notably J. Murphy's¹⁸ and N. Simmonds's¹⁹. Through this analysis and criticism another theory of mercy will emerge and it will be shown how this conception of mercy can throw a new light on the classical paradox of mercy (with new strategies for its solution). Also, if I am right, the difference between mercy and justice can be understood as a difference in the way an action was brought about. In what follows, I will argue so as to make this thesis about mercy more plausible by showing that the argument proposed by Simmonds in order to justify a reduction of mercy to judgement is not valid.

*Theories of Mercy*²⁰

Since Simmonds's argument was a reaction to J. Murphy's *Mercy and Legal Justice*, let me start by presenting and analysing the argument as it appears there²¹. Murphy offers a justification for the *impossibility* of performing merciful actions in legal contexts. However,

standard of which sorts of states of affairs are desirable. Again, there are no constraints on *the way* the states of affairs are brought about.

¹⁷ St. Anselm *Proslogium (with a reply on behalf of the fool by Gaunilo and the Author's reply to Gaunilo)* (Translated by M. J. Charlesworth) Oxford: Clarendon Press, p. 129.

¹⁸ Murphy, Jeffrie G. *Mercy and Legal Justice* in Coleman, *Philosophy of Law*, 1988.

¹⁹ Simmonds, N. E. *Judgment and Mercy* *Oxford Journal of Legal Studies*, Vol. 13, p.52-68.

²⁰ The reason why I shall not be dealing with Christodoulidis's theory of mercy (as in his *The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular Law and Philosophy*, Vol. 18, Issue 2, p.215-241) in this chapter is the fact that his argument concerns the relation between mercy and *formal* justice, and not in the relation between mercy and *substantive* justice. His argument about mercy and formal justice will be dealt with in chapter four, where I argue against a certain conception of formalism in law.

what is more important for my purposes is that his starting point is a theory of merciful actions that explains away the paradox of mercy. This theory of mercy states that merciful actions only take place in contexts in which someone has the right to bring about the application of a rule of justice (say a rule that connects a given punishment to a given act), not the duty to do so²². A merciful action consists in the decision by the bearer of the right not to exercise it and indeed to renounce to it. In other words, it is the decision not to enforce a rule of justice by someone who is entitled to do so. If what exists is not a *right* to apply the rules of justice, but a *duty* to do so, merciful actions cannot *logically* be exercised. Not to enforce the rule in this case is an instance of injustice, not of mercy. If this is a good theory of mercy, the 'paradox' of mercy is only an apparent paradox. But this is not the only consequence of adopting this theory of mercy. If one combines it with a very sound theory of legal practice according to which the enforcement of the rule of law is a necessary condition for a decision to be a correct legal decision and, consequently, that judges have a duty to apply the law, and not merely a right to do so, it follows that merciful actions are not part of the legal practice. If a judge performs a merciful action or a plea for mercy is made in a court of law, those are not normal legal events, but *mistakes*²³. In the most recent version of his paper, Murphy changes his mind on the subject and accepts that certain public agents (including judges) could be regarded as *representatives* of those who have the right to waive the application of the law²⁴. In the case of criminal law, this right can only be exercised collectively by the will of each individual belonging to the relevant social group. Although public agents, notably judges, have a duty to apply legal rules, they may be also the representatives of those individuals to exercise their right to waive the application of the rule. Even judges can be attributed such a role, although that is neither necessary (they would still be judges even if they didn't have those attributions) nor recommended by Murphy (because judges are not as immediately accountable for their decisions as, say, those who exercise executive functions). In short, it is a constitutive part of the role of a judge to have the duty to apply the law and, although it is not a constitutive part of the judicial role that they represent each individual of the population

²¹ Murphy's *Mercy and Legal Justice* was published in at least two slightly different versions. The earlier was published in Jules Coleman's *Philosophy of Law*, p. 3-14. The most recent was published in Murphy, Jeffrie G. and Hampton, Jean *Forgiveness and Mercy*, Cambridge: Cambridge University Press, 1988, 162-186. The later version corrects the earlier in a number of points, the most important of which is briefly mentioned below. The references below are to the later version.

²² Murphy's *Mercy and Legal Justice*, cit., p. 174-77.

²³ Murphy's *Mercy and Legal Justice*, cit., p. 175.

at large, they might be assigned also that role. I shall concentrate in what follows not so much on the specific arguments concerning institutional mercy, but on the argument according to which mercy can only be considered to be an autonomous virtue if it consists in the choice of not exercising a *right* to apply a rule²⁵.

What is wrong with Murphy's theory of mercy is that it doesn't explain central cases of the use of the concept. A good theory for a concept can exclude some instances of the concept's application by explaining those instances as mistakes in its use. But whenever the theory leaves aside very central cases of the use of the concept, what is being offered is not so much a theory of the concept as a proposal to refurbish the concept or, what is the same, the proposal of a new concept that is deemed to be better than the old one (because, say, it is easier to use, or it is morally sounder). This is the ground of Simmonds's criticism of Murphy's theory as he points out that Murphy shifts the emphasis from the judge to the victim and, consequently, fails to account for one of the central contexts in which the concept of mercy can be used, namely contexts of judgement in the exercise of a judicial roles. My own criticism of Murphy's selection of central cases is wider and applies to Simmonds's selection of central cases as well. Both Simmonds and Murphy concentrate in contexts of *retribution* and in doing so they disregard situations of sheer benevolence as relevant instances of merciful action. Contexts of retribution suppose that, first, there has been a wrong performed by the person towards whom one is in a position to show mercy and, second, that the wrong creates a right to inflict some sort of harm against the perpetrator. In contexts of benevolence, on the other hand, someone helps someone else who is enduring serious hardship without having to make any major sacrifice, as when I save someone's life from starvation by giving away a bit of the food I have in abundance. The only way Murphy can call this action merciful is by postulating a substantive norm of justice to the effect that there is no duty to save someone from starvation when this doesn't imply major sacrifice to the saviour. I don't know if Murphy subscribes to this super libertarian rule of justice (I believe he doesn't), but I am sure that I don't. People like me would, therefore, have problems with Murphy's theory of mercy for it leaves unexplained how this case could be an instance of a merciful action. What about Simmonds's case selection? Simmonds's case selection would be appropriate if it were

²⁴ Murphy's *Mercy and Legal Justice*, cit., p. 177-179.

²⁵ I deal with some problems concerning institutional mercy in the excursus to the second chapter below.

possible to regard acts of sheer benevolence as performed in a context of judgement passed in the exercise of a judicial role (in the broadest possible sense of 'judicial'). Showing mercy to a defeated enemy by sparing his life or to a starving man by giving him something to eat would only be considered instances of merciful actions if they were interpreted as belonging to such judicial contexts. Surely Simmonds's concept of judgement is ambiguous enough to give room to such an interpretation (as we shall see later), but regarding such actions as the exercise of a sort of *judicial* role would be, I believe, hard to justify.

A defence of both Murphy's and Simmonds's case selections could be offered on the grounds that concepts are not words and that sometimes we use the same word to refer to different concepts (recall Dworkin's famous example of the use of the word 'bank' to convey the ideas of both savings banks and riverbanks). It could be argued that there are two different concepts that could be conveyed by the word 'mercy', one of them typically used when a victim or a judge declines the right of enforcing a rule of justice and another one used when people help other people to endure hardship. I am not clear about how to answer to this claim, since it is not an explanation of the use of a concept in particular circumstances but a denial that the concept is really used in some circumstances. If we don't share a concept there may be nothing to do apart from **teaching** the concept. However, teaching concepts is not as easy as it might seem at first sight. A concept cannot always be taught (and some would argue that it can never be taught) by means of definitions or descriptions. Grasping the concept seems to be something that goes with a particular sort of experience. That experience is what *produces* the concept in someone's mind, not words. Cavell's comparison between Austinian and Wittgensteinian criteria aims at clarifying precisely this point.

The general relation between these notions [Wittgenstein's and Austin's] of a criterion is roughly this: If you do not know the (non-grammatical) criteria of an Austinian object (can't identify it, name it) then you lack a piece of information, a bit of knowledge, and you can be told its name, told what it is, told what it is (officially) called. But if you do not know the grammatical criteria of Wittgensteinian objects, then you lack, as it were, not only a piece of information or knowledge, but the possibility of acquiring any information about such object *überhaupt*; you cannot be told the name of that object, because there is as yet no *object* of that kind for you to attach a forthcoming name to: the possibility of finding out what it is officially called is not open to you. (To *what* does a child attach the official name <New York>? The child's world contains no cities.) This is, I take it, part of what Wittgenstein wished to suggest in saying that 'Essence is expressed by grammar': you have to know certain things about an object in order to know *anything* (else) about

it (about *it*).²⁶

Teaching the concept of chair means teaching the practice of sitting at the table. Teaching in those cases resembles training. The trouble with this strategy is that I have as good entitlement to be the ‘practice’ coach as Murphy or Simmonds have, since we all are fully capable members of our linguistic community. If it is really the case that we don’t share the same concept, the discussion of conceptions becomes senseless, for words will not help (directly at least) to develop the concept. I shall assume, therefore, that by ‘mercy’ we are referring to more or less the same cases of application of a concept and, what is more important, that our concepts of mercy are not only extensionally, but also intensionally identical.

In what follows, I will provide a theory of mercy that encompasses both merciful actions in retributive contexts and merciful actions performed in such contexts as giving money to beggars. This theory will be centred on one characteristic of merciful actions that is obscured when the retributive contexts are taken to be the only relevant contexts for the performance of merciful actions. My own conception of mercy will be better articulated through the analysis and criticism of Simmonds’s conception of mercy.

Simmonds’s view on mercy as expressed in 1993 is not a complete theory of mercy for it focuses on offering a justification for what Simmonds takes to be one of the necessary conditions for the correct use of the concept of mercy, to wit: the performance of merciful actions is intrinsically connected to judgements from universals. I feel safe to conclude that there would be no grounds to differentiate between merciful and (legally or morally) just actions if there were no other necessary condition for the correct use of the concept of mercy. Simmonds himself would recognise the need for further elaboration since he holds that merciful actions are not the same as (legally or morally) just actions. Indeed Simmonds doesn’t have any disagreement with Murphy on “substantive matters”²⁷ and gives explicit assent to Murphy’s “denunciation of the judicial exercise of mercy”²⁸. The reason why Simmonds doesn’t offer a complete theory of mercy is his option to concentrate on what I agree to be the central problem for a theory of mercy, namely, the alleged connections

²⁶Cavell, Stanley *The Claim of Reason: Wittgenstein, Skepticism, Morality and Tragedy*, Oxford: Oxford University Press, 1979, p. 77.

²⁷ Simmonds, N. E. *Judgment and Mercy*, cit., p. 54.

²⁸ Simmonds, N. E. *Judgment and Mercy*, cit., p. 54.

between, on the one hand, mercy and particularity and, on the other hand, justice and judgement from universals.

Simmonds's argument relies heavily on suppositions about what counts as a human action (or at least as a morally relevant action) and how human (morally relevant) actions are brought about. He seems to believe that *all human* action is necessarily preceded by judgement from universals. I believe that this conception of the antecedents of human action is wrong and I shall argue against it in what follows. What it misses is the fact that there are other ways in which human action and, more specifically, moral action can be brought about. Moreover, I believe that the key to understanding mercy as an autonomous virtue depends on the falsity of Simmonds's thesis that judgement necessarily precedes human action. Notice that I am not denying that there are criteria according to which to judge whether or not a merciful action is appropriate in particular circumstances. As Scott Veitch has pointed out, the absence of criteria makes judgement on the appropriateness of an action impossible and, in a sense, leaves the rightness of an action up for grabs²⁹. That approach to the role of particularity in the conception of mercy, favoured by Detmold and, as Veitch pointed out³⁰, by Derrida, is not to be confused with my own approach. The difference between mercy and justice, I believe, has more to do with the fact that different moral actions spring from different *ways* in which a moral agent relates to the particularity of the context. In Simmonds's understanding of the relation between judgement and mercy, *one way* in which we can negotiate our way through a world of particularities is ruled out from the start as implying a metaphysical fiction. In what follows, I shall dispute that claim and try to show that no unsustainable metaphysical is implied by that particular way of relating to particularity. But before I move on to present my criticism of both Simmonds's thesis concerning the relation between judgement, particularity, and mercy and of the argument he provides to justify it, let me first present what I believe to be the core of his argument.

Mercy, says Simmonds, is intrinsically connected to judgement. Although he is not totally clear about what is meant by judgement (he claims that the concept is ambiguous) it seems that in judgement both the "application of general categories and considerations to

²⁹ Veitch, Scott *Doing Justice to Particulars* in Christodoulidis, Emilios *Communitarianism and Citizenship* Aldershot: Ashgate, 1998, p. 232.

³⁰ Veitch, Scott *Doing Justice to Particulars*, cit., p. 221 ff.

particulars”³¹ and the “validation of arguments before an authority”³² occur. The argument aiming to connect mercy with judgement starts with the assertion that pleas for mercy always take the form of calling attention to a feature of the case. So, if I beg you to be merciful, I would be saying (or implying) that ‘you should do this because of fact x’. If the fact mentioned as a ground for your action is a universal feature of the case, to ask for mercy is equivalent to asking for judgement to be passed regarding the fact mentioned. In this situation, mercy and judgement would be intrinsically connected. As Simmonds put it:

If one offers some general reason for being given lenient treatment, or one points to features of the case that support such claim, an argument of justice has been offered, and in asking for justice one does not ask for mercy³³

What if the fact mentioned to ground the appeal is a particular fact, for instance, my unique particularity (“you should do this because I am the Tichborne Claimant”)? But this possibility, says Simmonds, just begs the question, for it is not at all clear what could be meant by the phrase ‘unique particularity’. If ‘unique particularity’ is understood as being in contrast with the universal characteristics of the case, then it could be part of a claim that some parts of the real world (human subjectivity, for instance) are such that they cannot be fully described in any combination of universal terms, no matter how long and complex.

Simmonds then points out that, if it is not possible to reduce the concept of unique particularity to universal terms, this concept is itself “irreducibly abstract”. Trying to escape universals we generate an abstract (and, therefore, universal) concept³⁴. According to Simmonds, the idea of unique particularity is dependent upon a metaphysical picture of the world as something which is ‘out there’ and which we can grasp. But, as Simmonds reminds us ‘our grasp of the world is always mediated’³⁵ by our thought. And this means that it is mediated by the universal concepts through which we understand the world. I shall try to demonstrate later that it is not the idea of unique particularity but rather Simmonds’s own conception of knowledge that implies a very demanding metaphysical picture of the world, but let us now follow Simmonds’s argument to its conclusion.

³¹ Simmonds, N. E. *Judgment and Mercy*, cit., p. 56

³² Simmonds, N. E. *Judgment and Mercy*, cit., p. 56.

³³ Simmonds, N. E. *Judgment and Mercy*, p.59]; about practical reasoning as consisting on stating relevant facts see also Raz, *Practical Reason and Norms* 1990, P. 16-20; Detmold, M. J. *The Unity of Law and Morality*, London: Routledge & Kegan Paul, 1984, p. 8.

³⁴ Simmonds, N. E. *Judgment and Mercy*, cit., p. 65.

If 'unique particularity' cannot be but an universal concept, it would follow that the claim of particularity is either nonsense or else it is a short name for a bundle of universal features. When I say 'you should do this because I am 'the Tichborne Claimant', 'the Tichborne Claimant' would be short for 'beggar', 'starving', 'ex-prisoner' etc. And this means that a claim for mercy is either an attempt to call attention to some universal feature of the particular situation or else it is nonsense. Therefore, mercy and judgement, says Simmonds, are intrinsically connected.

In order to introduce my attack on Simmonds's argument, let me first point out that his conclusion is true if and only if either moral action is necessarily connected with (what he calls) judgement or merciful actions have a special feature that makes them different from general moral action in that they are necessarily connected with judgement. Simmonds doesn't offer any criterion to differentiate mercy from justice (legal or otherwise), therefore, the second way to justify his claim about mercy and judgement is not available to him. My analysis in what follows will concentrate on the first strategy and, to state the conclusion in advance, I believe that Simmonds argument both misses the point of appeals to particularity in morals and is grounded on a wrong conception of human understanding. I disagree with Simmonds on two different points: a) we seem to disagree about how morally relevant actions can come about and b) we seem also to disagree about the nature of propositional intensionality. The next section will deal with the first point of disagreement between me and Simmonds, and the section following the next will deal with the second. Both tasks are made the more complicated given the ambiguity above mentioned in Simmonds's conception of judgement. The first thing to do, then, is to spell out this ambiguity.

Causality and Moral Action

One way of conceiving 'practical judgement' is to define it as whatever precedes and directs human action. In this understanding of judgement, actions performed without reflection would be as much a result of judgement as actions performed after careful consideration. Suppose that I am in a bad mood and John keeps teasing me about the fact that I have once mispronounced a word in English and I end up punching him right in the nose (much to my regret later). According to this conception of judgement, my punching John out of impulse is

³⁵ Simmonds, N. E. Judgment and Mercy, cit., p. 64.

the result of judgement as much as my punching John after careful consideration and after deciding that attacking him was the right thing to do. I don't believe that Simmonds is referring to that when he uses the term 'judgement', but if he is I agree with him that any merciful action would be connected to judgement since it would follow from the very definition of judgement combined with the characterisation of merciful action a species of human action. In this conception, judgement is identical to what classical theorists called "acts of will". The existence of such entities has been subject to careful analysis and heavy criticism since Ryle's *Concept of Mind*, but regardless of the felicity of those criticisms, something can be clearly established: if judgement is so conceived, the statement that mercy is intrinsically connected to judgement gives us very little information about merciful actions and, more specifically, about what precedes those actions. As Ryle pointed out when writing about the idea of "acts of will" we are told virtually nothing about them but that they must exist³⁶. We don't know how to perform them or what the performance consists in or which qualities we can predicate of them, or anything else. The little we learn is that those sorts of mental acts (or judgements so conceived) must exist. The justification for this 'must' apparently comes from the fear that were human action to be explained in terms of regular causes for events there would be no grounds for blaming or praising people, since it would not be possible to conceive human action as voluntary. Men would be necessarily regarded as helpless victims of causal chains and blaming or praising them would be as sensible as blaming or praising an ice cube for melting at room temperature. The justification for the use of the concept of judgement in this sense depends, therefore, on the fact that that fear is justified. In recent years, various arguments have been offered to explain why this fear is not justified, and if those arguments work, the idea of 'acts of will' would be part of a metaphysics of mind that is not justified. I will present one of them (the one which I accept) when I come to analyse the possibility of explaining actions in terms of causes. Before we move on to that, let me sketch another two conceptions of judgement.

The second way of conceiving judgement is not vulnerable to the criticism that it implies a non-justifiable metaphysics of the mind; let me call it, following Audi, judgement in a propositional sense. Judgements in a propositional sense are 'taken to designate the content of

³⁶ Ryle, Gilbert *The Concept of Mind*, Harmondsworth: Penguin Books, 1949, p. 63 ff.

a judgement someone does or might hold'³⁷. This sort of judgement can be 'external to the intellect'³⁸ in the sense that an instance of a judgement in a propositional sense implies neither a *mental state* of holding a judgement nor an *action* of judging. Since they connect to neither mental states nor actions they are said not to be motivational. If merciful actions are regarded as justifiable (in the sense that they can be the content of a judgement that might be held), it follows that they are necessarily connected to judgements in a propositional sense. The supposition that merciful actions are justifiable runs through the whole of Simmonds's article and on this point we are in accord³⁹. And if what Simmonds is saying is that merciful actions are necessarily connected to judgements in a propositional sense, we are again in accord. If the whole issue about the 'paradox of mercy' is the impossibility of performing at the same time an unjustifiable (merciful) action and a justifiable (just) action, I would agree that the paradox only arises if one conceives merciful actions wrongly (as unjustifiable). But the paradox of mercy may be hinting at something entirely different and at this further level of analysis the paradox still holds. This further possible reading of the paradox will be better understood if we relate it to a third possible conception of judgement.

Before I start explaining the third sense in which one can conceive of 'judgement' let me just make my general point concerning the relation between this conception of judgement and mercy clear: I claim that it is one of the essential features of a merciful action that it does not follow from judgement understood in this third sense. Indeed, the fact that they are not preceded by judgement so conceived is the hallmark of all particularity-dependent actions. Judgement in this third sense (which I understand to be the sense in which Simmonds uses the concept) is what *motivates* action and is also the end of a process of justification in which universal concepts are said to cover the particular case (in other words, they are reasons for action). That means that I *judge* whenever I perform action X because that is the right thing to do under conditions Y and Z and, of course, I believe that those conditions are present. There is an ongoing discussion among philosophers of action about the problem whether motivation follows from judgement or motivation comes from somewhere outside the judgement (e.g. my desire to be just)⁴⁰. This discussion is irrelevant for my purpose of showing that mercy can

³⁷ Audi, Robert *Moral Judgement and Reasons for Action*. In: Culluty, Garret and Gaut, Berys (eds.) *Ethics and Practical Reason* Oxford: Clarendon Press, 1997, p. 133.

³⁸ Audi, Robert *Moral Judgement and Reasons for Action*, cit., p.133.

³⁹ See my discussion of Veitch's objections to the use of particularity in the preceding section.

⁴⁰ On this discussion see Audi, Robert *Moral Judgement and Reasons for Action*, cit.

(indeed must) be conceived as having no necessary connection to judgement. Firstly, because if judgement has nothing to do with motivation, the merciful action is not brought about by judgements; secondly, and more interestingly, even if judgement brings about motivation, judgement is certainly not the only thing that can motivate an action. That last claim is what I believe to be the bone of contention between me and Simmonds. Allow me to introduce which other sorts of things I believe can motivate moral action.

I believe that morally relevant actions can be brought about in a non-reflexive way. If I am right, unreflected actions which are motivated by *causes* and not by the *conclusions of reasoning processes* would also be subject to moral assessment (whether positive or negative). What I have in mind are cases such as the one described above in which I punch John because he is teasing me and I am not in a good mood. John's actions cause my action in any relevant sense of 'cause'⁴¹. Not seldom, when similar things happen we do blame people on moral grounds because we think one should (or should not, depending on the case) follow his inclinations without reflecting. And the same goes for praise. We do praise people that without thinking for a second risk their lives to save a child from otherwise inevitable death, and we do this more easily than we praise the actions of those who perform an evaluation of the whole situation (e.g. value of the child's life against the risk to and value of one's own), even if they arrive at the same conclusion and end up trying to save the child. My claim that human action has causes is related to the idea that reasons themselves, under some conditions, work as causes. If morally relevant actions can indeed be caused, it would follow that judgement (in the third sense), need not, though it might, precede moral action. Davidson's analysis of reasons for action will be useful here, for once it is clear how reasons can work as 'causes', it will also be clear how reasons for action are not the only possible cause for an action. Reasons that inform action can be analysed in two elements. As Davidson puts it,

[w]henever someone does something for a reason [...] he can be characterised as (a) having some sort of pro attitude toward actions of a certain kind, and (b) believing (or knowing, perceiving, noticing, remembering) that this action is of that kind.⁴²

⁴¹ About actions being caused MacIntyre, Alasdair *The Antecedents of Action*, cit.

⁴² Davidson, Donald *Actions, Reasons and Causes* in *Actions & Events*, Oxford: Clarendon Press, 1980, p. 3.

This *pro* attitude under (a) comprises, amongst other attitudes, ‘desires, wantings, urges, [and] promptings’⁴³. They are supposed to cover both permanent and transitory traits of character. According to Davidson, it is *a belief* that those attitudes attach to, in order to cause action⁴⁴. But suppose that some of those traits of character are excited by something different than a belief, say, an awareness of a particular situation which resembles more a passive *affection* than a proper propositional attitude (as beliefs must be). Wouldn’t it be correct then to say that an action was caused by the excitement of a disposition by a fact external to the mind of the agent? Wouldn’t it make sense then to talk about actions being *caused* by that *affection*? As Mill has shown, there is no reason why ‘persistent states’ should not be considered to be causes⁴⁵. And there is no reason why states of character such as the ability of being affected and reacting in certain ways should not be considered to be the sort of ‘persistent state’ that might bring about action.

A number of well known objections have been raised against the possibility of thinking of human action in terms of causes and I move on now to analyse those objections. MacIntyre identifies two main attempts to show that actions cannot be conceived as having causes:⁴⁶ the first of them is the thesis according to which physical events cannot cause human action, while the second is a thesis about the nature of intentionality, inclinations, etc.

The first objection may simply mean that physical events cannot count as necessary and sufficient conditions for action. This thesis would probably be grounded in the fact that talk about human action is logically different from talk about physical facts, such as bodily movement. Many philosophers and moralists, afraid of the implications of physical determinism of human actions to central aspects of moral life such as attribution of blame and praise, offered different, yet related, arguments in order to ground not only the difference between those two levels of human discourse, but the separation of the two levels as well. There is no need to analyse these arguments, since the point they are trying to make could be happily conceded. Remember that in my introductory examples above, the actions always depended on something non-physical, namely a disposition to act in a particular way. As

⁴³ Davidson, Donald *Actions, Reasons and Causes*, cit., p. 4.

⁴⁴ Davidson, Donald *Actions, Reasons and Causes*, cit., p.4.

⁴⁵ Following Mill, Hart and Honoré criticise Hume’s apparent restriction of causes to events. To use their terminology, ‘persistent states’ should be excluded from the set of prospective causes (see Hart, H. L. A.; Honore, Tony *Causation in Law* 2 ed. Oxford: Clarendon Press, 1985, p. 16).

⁴⁶ MacIntyre, Alasdair *The Antecedents of Action*, cit., p.197.

MacIntyre said about this concession:

Yet what follows about causality? Only that if we are to look for the causes of human actions, then we shall be in conceptual error if we look in the direction of the causes of the physical movements involved in the performance of the actions. It does not follow that there is not direction in which it would be fruitful to search for antecedent events which might function as causes.⁴⁷

An argument for the separation between physical events and human actions is only an argument against the existence of causes for action if one assumes a further premise according to which causality is a category applicable only to physical events (and they would be then assuming the conclusion as a premise) or that only physical events count as causes. This would only make sense if physical events were to be the terms in which every fact in the world would have ultimately to be accounted for. And this is actually the project of those modern thinkers that aimed at building an absolute conception of the world, a conception that would be able to incorporate (by providing an explanation of) the relative perspectives that we have and would finally allow us to see the world as it *really* is. The way to do so was to provide a distinction between primary and secondary qualities so that the former are genuine qualities of everything that exists and the latter are not part of the objective world, but of the inner world of the mind. In order to purify our understanding of the world from secondary qualities criteria have to be offered to distinguish primary from secondary qualities; and indeed Descartes, Galileo, Locke and more recently Bernard Williams attempted to do so⁴⁸. Different as those criteria may be, the results that follow from its application to the qualities of things are unsurprisingly similar. The primary qualities are the basic qualities upon which modern physics was built (dimensions, position in space and time, etc.). At the very beginning of modern times, the project to build an absolute conception of the world becomes the project of building a physical conception of the world.

In recent years, many pages have been written on the impossibility of such physical or indeed

⁴⁷ MacIntyre, Alasdair *The Antecedents of Action*, cit., p. 200.

⁴⁸ About the rise of the doctrine of primary and secondary qualities and the different criteria used by different authors, see Hacker, P. M. S. *Appearance and Reality*, Oxford: Basil Blackwell, 1987, p. 1-19.

any other absolute conception of the world⁴⁹, but the analysis of all the arguments put forward for and against this possibility is clearly beyond the scope of this work. However, I take this absolute conception to be impossible for one specific reason, which I believe sums up most of what has been said against it.

An absolute conception of the world wouldn't have to take secondary qualities into account as terms in which descriptions about the real world make sense, but it would have to take them as one of the many objects that it should account for (alongside thunders, stars and black holes)⁵⁰. If a conception aims at being absolute it cannot decline this challenge; otherwise, it would be only a partial description of the world. In order to do so, the absolute conception would have to provide an explanation of intensionality. Explanations of a secondary quality (e.g. red) in extensional terms even if absolutely coincident ('red is the disposition to reflect light at the frequency x') would not explain intensionality. If you don't agree with that, try to give a physical explanation of red to a person who is blind from birth. The person would not understand what red means. Give to this person a device that reads light frequency and which can be read in Braille. The blind person is now able to identify red objects precisely (perhaps even more precisely than I can). But the blind person still does not know what red is. Physics cannot explain intensionality by providing an extensionally coincident definition in its own terms. It follows that a physical conception (because it doesn't take into account intensionality) cannot be an absolute conception. If that is true, the grounds on which one can feel tempted to believe that only physical events can operate as causes namely, that physics provide a complete description of the world as it really is, are not sufficient. I can't think of any other reason why someone would think that only physical events could count as causes.

The second objection to the idea that human action can have causes, is a thesis according to which 'causes' don't have any explanatory value to the understanding of human action, and its accompanying argument. As the argument goes, actions can *only* be properly explained by

⁴⁹ Among others, the subject was dealt with by Thomas Nagel (v.g. *Subjective and Objective in Mortal Questions*, Cambridge: Cambridge University Press, 1979, p. 196-213), Hilary Putnam (*Renewing Philosophy*, Cambridge/Massachusetts: Harvard University, 1992), John McDowell (*Non-Cognitivism and Rule-Following* in Holtzman, Steven H. and Leich, Christopher M. *Wittgenstein: to follow a rule*, London: Routledge, 1981), and Bernard Williams (*Williams, Bernard Ethics and the Limits of Philosophy*, London: Fontana Press, 1985, esp. p. 132 and ff.)

⁵⁰ Williams himself admits that such a conception has the burden of explaining 'psychological and social phenomena, such as beliefs and theories and conceptions of the world, and there may be little reason to suppose that they, in turn, could be adequately characterised in non-perspectival terms' *Ethics and the Limits of Philosophy* cit, p. 140.

reference to the existence of intentions, decisions, desires and kindred concepts. The main argument against the thesis that causality plays a role in the explanation of behaviour is that intentions and kindred concepts are not external to the action, but internal (logically connected) to the action. A cause must be, by definition, antecedent to the consequence, but the relation between, say, intention and action must be of another kind entirely. Another way to put the same thing is to say that motives are not events (they are internal to the action), while causes are necessarily events⁵¹. If I pass you the salt with a smile, I may be intending to be kind even if there is no previous event of 'intending'. As Wittgenstein put it:

“644. ‘I am not ashamed of what I did then, but of the intention which I had.’
- And didn’t the intention lie also in what I did? What justifies the shame?
The whole history of the incident”⁵²

This criticism aims at the traditional theory of the acts of will but most of its advocates claim that it hits much more than its target: it proves not only acts of will are not necessary to explain action, but that no sort of causal connection exists that have actions as their consequence. But suppose that in a given situation there is an act that can clearly be identified as ‘forming an intention’. Suppose that after a careful process of deliberation, weighing reasons for and against lending money to my impoverished friend, I decide that I should give her some money when I next see her. Hasn’t my deliberation and decision, my forming an intention, worked as a cause for the action later performed? If the answer is no, if this process of forming my intention does not work as a cause for my action, the whole process loses its point and, what is more serious, if there is no way in which any deliberation can cause any action, the practice of deliberation itself loses completely its point.

One could argue that forming an intention is not a necessary condition for every action. This is true, but this does not imply that when deliberation happens it could never be a necessary condition (a cause) for action. And one could insist that not always the action intended would follow from the decision to form an intention. This is also true, but it only shows that what I have been treating as a paradigmatic case of cause for action (the deliberation and decision for an intention) is only one instance of possible causes for action. Let me bring from MacIntyre’s article an example of a cause for action that is not result of deliberation by the agent:

⁵¹ A version of this argument was offered by Melden, A. I. *Free Will* London: Routledge & Kegan Paul, 1961, p. 52.

⁵² Wittgenstein, Ludwig *Philosophical Investigations* 3 ed. (Translated by Anscombe, G.E.M.), Oxford: Blackwell, 1967, p. 165e.

“I may discover that when you are in a certain frame of mind I can get you to act by giving you information which affords a motive or a reason. Your action bears testimony to the fact that it was this motive or reason on which you are acting”⁵³

To sum up: there is no reason to believe that a causal link between reason and action is excluded by the fact that a reason can be used to explain an action (by redescribing it in its own terms) and that, as a consequence, reason and action are logically connected⁵⁴.

One can only speculate about the reasons that lead theorists to try to extend the argument against the theory of the acts of will to any causal connection whose consequence is an action. The immediate cause seems to be a limited conception of human beings as beings that have intentions and desires and take decisions, a conception that rules out characteristics of human beings as having inclinations. The explanation of why such an *ad hoc* restriction on relevant philosophical data was carried out is more difficult to provide. I shall be dealing later with the conception of human being required by the thesis that actions can have causes. Although I have argued against the two main objections to the thesis that actions can have causes, the conditions under which the thesis would be correct are yet to be specified. I shall deal with this problem later on this chapter. Let me first use once more the example of merciful actions to show the significant difference between moral actions that are caused (brought about) by the excitement of dispositions and moral actions that are caused (brought about) by rational deliberation. I trust that the example will show how awkward an explanation of mercy would be if the merciful actions are considered to follow only from reasoned judgement.

Recall that, according to Simmonds, a plea for mercy has to be understood as an attempt to call someone's attention to some features of the situation in which he or she is about to act. He believes pleading for mercy would be roughly the equivalent of saying that 'one should do X because in this situation the feature Y is present.' The first thing to be noted about this conception of a plea for mercy is that from the fact that I can only bring you to perform an action through arguing that whenever feature Y is present one should do X it doesn't follow

⁵³ MacIntyre, Alasdair *The Antecedents of Action*, cit., p. 206.

⁵⁴ For the same opinion see Davidson, Donald *Actions, Reasons and Causes*, cit., p. 13-15. Davidson also sees 'something very odd in the idea that causal relations are empirical rather than logical' (p. 15). Although I agree that causal relations are logical, it seems that this argument cuts no ice against the argument of the internality of reasons. The argument seems to assume that the causal-logical connection always links sentences that refer to different events, and also that reasons are *not events*. The trouble with the argument is simply that the latter thesis, as we saw above, is false.

that your action is always based on the belief that whenever feature Y is present one should do X; and it is so for the simple fact that one doesn't need to hear a plea for mercy in order to be merciful.

The second, and more interesting point, is that I believe Simmonds misunderstands what a plea for mercy is. In order to explain what I think a plea for mercy is, let me start by pointing out that, if actions can be caused in the sense explained above, arguing is not the only way to bring about an action. Simmonds's picture of the plea for mercy assumes that the only thing I can do to bring about a morally relevant action from you is to show you the reasons why you should decide to perform that action. But we can provoke actions that are morally good or bad by causing them. A plea for mercy could be conceived as an attempt to cause a reaction through the excitement of someone's settled dispositions. One, of course, can communicate a state of affairs through a plea for mercy but its aim is not to bring about an action through giving reasons for action to someone else. Simone Weil would then have understood it better than Simmonds when she saw that the afflicted is not saying "do this because it is the right thing to do under conditions X and Y". He or she is just shouting, and the shout means only "Why am I being hurt?"⁵⁵.

Another way to understand how a plea for mercy can be conceived as being an attempt to cause a reaction would be to show the analogy between pleas for mercy and the language of pain, as Wittgenstein described it. The pain language-game, as many other instances of language-games, is connected to some facts of nature and, specifically, the human nature. "Connected" here doesn't mean only that certain facts of nature are necessary conditions for the growth of a certain practice, but also that sometimes, as in the case of pain, statements such as 'I am being hurt' are grammatically equivalent to natural expressions like moaning⁵⁶. They are grammatically equivalent in the sense that to understand what "I am being hurt" means involves knowing how to react in certain ways to the utterance, and those reactions are equivalent to reactions to a desperate cry, to moaning and to other forms of pain-behaviour. If expressions such as 'I am being hurt' are equivalent to moaning, it might be illuminating to

⁵⁵ Weil, Simone *Human Personality* in Siân, Miles *An Anthology*, London: Virago Press, 1986, p. 72.

⁵⁶ On the equivalence with natural expressions see, for instance, Wittgenstein, Ludwig *Philosophical Investigations*, sec. 244). A more complete explanation can be found in Vesey, Godfrey *Other Minds* in Vesey, Godfrey *Understanding Wittgenstein*, Ithaca, NY: Cornell University Press, 1974, p. 149-161.

analyse what is a child trying to do when he or she cries. What they are trying to do is fundamentally to provoke a reaction.

If a plea for mercy is analogous to the pain language-game, it shouldn't be understood as the communication of some features of the situation, so that the listener can take those features into consideration before acting. Here lies the fundamental difference between the two descriptions of pleas for mercy: if one takes actions as being always preceded by judgement, one is bound to analyse the cry "Show mercy, I beg you" as equivalent to (an abridgement of) "Perform action X, because Y (pain is happening to me) is the case", while if one believes that actions can be caused, the same cry can also be understood as an attempt to excite someone's dispositions and to provoke action not reflected upon.

I will come back to this topic later in order to consider the problem of what is needed if we are to admit that moral actions can be caused. Before moving on to this problem, however, it is worth asking what is the impact of my claim that actions can have causes to Simmonds's argument about mercy (which I take by extension to be applicable to all particularity-dependent actions).

If it is true that moral (and indeed immoral) actions can be caused, not following from any judgement, Simmonds's general argument would seem to fail. For even if it were the case that the only way of *understanding* an object is through universal concepts, there would be different ways in which those universal concepts can motivate action. It is true that they can motivate action because they relate in particular ways to other concepts such as 'should' and 'is forbidden', which, depending on the view one might adopt, either have some motivational power in themselves (internalism) or are concepts to which the psyche of a good man attaches positive motivational value (externalism). But it would also be true that they can motivate action by striking some dispositions to act in the agent. If it is true to say that there is a way through which universals can bring about (morally relevant) action, even if *no reasoning* is performed, it follows that the fact that we can only perceive the world through universals doesn't imply that all sorts of moral action necessarily follow from reasoning. It is one of the main contentions of this thesis that the way an action is brought about is morally relevant in itself. That means that the moral criteria by which one judges the way an action came about are at least partially different from the criteria that are used to judge the material action performed.

Simmonds could always argue, however, that I misunderstood his argument. He might say that he was only arguing for the fact that we can only think about the world through universals and that therefore both mercy and justice cannot follow from any magic 'attachment' to the particular. He could answer to my objection by showing that not only it does not contradict his thesis about the connection between mercy and judgement, it also reinforces it.

I imagine such an answer would run along the following lines. Not all behaviour caused by external causes (as opposed to 'mental' or 'internal' causes') is morally relevant. When the doctor hits my knee and my leg jumps up and ends up breaking something, that behaviour does not count as a morally relevant action (assuming that I had no reason to believe that harm would be produced by the doctor examining my knee). Only sometimes causes can bring about morally relevant action. How should we discriminate among them? A good way to discriminate would be to say that causes are only relevant to the extent that they excite a disposition of someone's character that is either morally praiseworthy or morally blameworthy. Up to this point I see nothing wrong with the counter objection. Indeed, a morally relevant action only follows from causes because the action springs from a combination of a cause with a settled disposition of the agent's character. The fact that certain actions come about every time one sees a beggar shows the *kind of person* one is. That is what is missing in a purely physical conception of causality, and that is why purely physical causality is morally irrelevant. This conception of the moral value of *caused actions* would only make sense if moral judgements can be passed on moral persons as well as on moral actions. I shall come back to the thesis that moral persons are the object of moral judgement later, but since both me and my hypothetical objector agree that the thesis is true, let me continue to present the objection.

In order for an agent's settled dispositions to react to certain states of affairs, it is necessary that the agent be *aware* of those states of affairs. If it is true that, as Simmonds explicitly believes, one can only be aware of states of affairs by means of grasping the universals that help to describe the state of affairs (what I should call from now on, propositional knowledge), it follows that causes are only morally relevant when someone believes she is in a situation *x*, so that *x* is an *F*⁵⁷. At the end of the day, Simmonds would have to argue that epistemology comes into the picture to ground his thesis that judgement and mercy are essentially connected.

Whenever an action is caused by a given state of affairs, the action is preceded by a description of the relevant features of the situation (i.e. those features that eventually excite the agent's settled dispositions). Even in those actions that seem to be performed almost instantly, like when I jump into the river in order to save a child's life, my action was preceded by a very fast enumeration of the relevant features of the situation.

I don't believe that the awkwardness of postulating such judgements before almost instantaneous action is enough to prove Simmonds wrong. The reason why I believe that he is wrong is the fact that his thesis, according to which the only way one can be aware of a state of affairs is through propositional knowledge, leads either to epistemologically unacceptable consequences or to a certain conception of the metaphysical groundfloor which is in need of justification. I shall dedicate the next section to justifying this claim.

Intensionality, Universals and Particulars

Let me state from the outset what I believe is lacking in Simmonds's epistemology. I believe, along with Russell and others, that there is at least one sort of knowledge which is not propositional and which is, moreover, incompatible with propositional knowledge. If I am right, Simmonds's argument is grounded on a false premise, namely, that human understanding (which corresponds to the phenomenon of intensionality) is always *propositional*. Objecting to Simmonds's premise would be tantamount to defending what might be called a weak version of intuitionism⁵⁷, and I shall be doing just that in this section.

The intuitionism I shall try to defend consists simply in one thesis, namely, that there is a way to acquire knowledge about something for which an *affection* is a condition both necessary

⁵⁷ Where F is a function of all the universal features applicable to x.

⁵⁸ By 'intuitionism' here I don't mean 'moral intuitionism'. The intuitionism that I defend, according to which there is a sort of knowledge that is acquired by being *affected* by a particular object, is fully compatible with the denial that moral objects 'stand for some kind of non-empirical properties or relations' which cannot be grasped by 'the five senses but rather by a further faculty', which is sometimes regarded as 'something akin to a sixth sense' and sometimes as 'a capacity for a priori insight', which is how Alexy characterises moral intuitionism (Alexy, Robert *A Theory of Legal Argumentation* Translated by Ruth Adler and Neil MacCormick, Oxford: Clarendon Press, 1989, p. 37-8). As we shall see below, the *affective capability*, to which I refer in my version of intuitionism, is not so much a sixth sense, but a sort of *attentiveness* to certain states of affairs. This attentiveness is akin to what Iris Murdoch called *loving attention*, that is, a disposition to perceive things without having to go through categorisation in order to grasp them (in her *The Sovereignty of the Good* London: Routledge and Kegan Paul, 1970).

and sufficient. By affection here I mean the fact that the object of one's knowledge affected (caused) the judgement. The sort of phenomenon I have in mind is immediate and purely *passive*. The sort of grasp on the object that ensues from this affection would not be descriptive, which means that it would not be the form of knowledge that is expressed in 'I know that x, so that x is F'. Russell thought that one reason why this sort of knowledge must be possible is the fact that '[e]very proposition which we can understand must be composed wholly of constituents with which we are acquainted'⁵⁹. Propositional knowledge (which includes knowledge by description) would, then, presuppose the existence of another sort of knowledge, which he called 'knowledge by acquaintance'. Let me call the principle according to which all constituents of propositions must be known by direct acquaintance the 'Constitution Principle'. If I prove that Russell's Constitution Principle is correct, it would follow that Simmonds would be wrong in saying that all knowledge is necessarily acquired by means of deductions from universals, for all explanations in terms of universals would depend ultimately on knowledge that is not analysable into a description. One complication with proving Russell's Principle of Constitution is the fact that one has to reduce also the *form of the proposition* to some sort of knowledge by acquaintance⁶⁰. That complication can be avoided here, since my aim is to make the point that knowledge by acquaintance is only a *necessary* but not a sufficient condition for propositional knowledge. In order to do so, a weaker version of the Principle of Constitution will suffice, according to which *there are some* elements of the proposition whose understanding depends on knowledge by acquaintance. Which arguments could be adduced to corroborate such principle?

The argument I have in mind is by no means new⁶¹, but I believe no effective objection has been raised against it. From the truism that for one to know what one is thinking, one must know what one is thinking *about*, it is possible to infer that for one to know what one is thinking one must be able to discriminate the object of one's thought from any other object. I shall call it, following Paulo Faria, the 'Principle of Discrimination'⁶². Now suppose that two numerically distinct objects have exactly the same features. In that case, the discrimination

⁵⁹ Russell, Bertrand Knowledge by Acquaintance and Knowledge by Description in: Russell, Bertrand *Mysticism and Logic and other essays* London: George Allen & Unwin LTD, 1917, p. 159.

⁶⁰ Faria, Paulo Discriminação e Afecção in Marques, Edgar et al (eds.) *Verdade, Conhecimento e Ação* São Paulo: Loyola, 1999, p. 148.

⁶¹ A version of it is to be found, for instance, in P. F. Strawson's *Individuals: an Essay in Descriptive metaphysics* London: Methuen, 1959, pp. 17-23.

⁶² Faria, Paulo Discriminação e Afecção, cit., p. 150.

principle cannot be satisfied by propositional knowledge alone, for any possible description of one object would also apply to the other object, so that from the descriptions alone one would not be able to discriminate between the objects.

The only defence I can envisage for the thesis that awareness of states of affairs must always be propositional would be to argue that numerical diversity is impossible given conceptual identity. In that case, propositional knowledge would be able *by definition* to satisfy the principle of discrimination. The thesis that numerical diversity is impossible given conceptual identity would be correct only if a particular metaphysical conception of what ultimately the world is made of is true. The thesis I am referring to is the one according to which the only sorts of things that exist are universals and that, consequently, particulars are just an illusion that can be explained in various ways. According to this metaphysical thesis, all that appears to be a particular to the untrained eye, must be considered simply a bundle of universals. The 'bundle theory' has been the object of intense debate in recent years, and the discussion tends to concentrate on Black's counterfactual world composed solely of two conceptually identical spheres situated at some distance of one another⁶³. In such a world there would be two numerically distinct objects (by definition), but the description of each of them would be *precisely the same*. All the universals that apply to one, also apply to the other. Even the Leibnizian strategy of differentiating them by means of attributing to them different space co-ordinates would not be available. The two spheres are the only two points of reference in this counterfactual world and the only thing that can be said about each sphere's co-ordinates (that is, that it is at a certain distance of the other sphere) can also be said about the other. Spatial and temporal co-ordinates, if they are to help in describing an object in the world, must rely on a reference point. The only two reference points in Black's counterfactual world are the two spheres, which are at the same distance from each other. Any co-ordinates that apply to one of the spheres, also applies to the other. Leibniz's argument relies on the existence of other objects that could work as a referential for the co-ordinates. In a world where there is not way to anchor co-ordinates that implies any difference between two objects, those two objects could not be distinguished by means of an appeal to spatial (and, analogously, temporal) co-ordinates.

John O'Leary-Hawthorne has recently argued that Black's counterfactual is no refutation of

the bundle theory once we adopt a concept of immanent universals that can be fully present in two different places (as redness is fully present in this book and on that wall)⁶⁴. It would follow that the same universal could be at different places at the same time and, consequently that a bundle of universals could be at some distance from itself. If that is correct, it is impossible to conceive of numerical diversity when one bundle of universals happens in two different places. And if that is the case, Black's counterfactual world would pose no problem whatsoever to the bundle theory that, consequently, cannot be readily ruled out. Zimmerman came to Black's help to show that O'leary-Hawthorne's immanent universals cannot save the bundle theory from Black's counterfactual⁶⁵.

However, regardless of which metaphysical thesis is right, it is clear that, if the principle of discrimination is correct, the truth of Simmonds's thesis would depend on a particular metaphysical picture of the sorts of things of which the world is made. Without such a complement, Simmonds's argument simply does not work. I shall not pursue the matter further here, for a metaphysical discussion about what sorts of entities are to be found in the metaphysical groundfloor would take much longer than I can afford. Assuming that it is possible that numeric multiplicity occurs in contexts of conceptual identity, some interesting consequences follow about the ways in which one can conceive human knowledge.

If the very demanding metaphysics required in order to ground the thesis that two conceptually identical objects cannot be numerically identical cannot be justified, it follows that Simmonds epistemology cannot comply with the Principle of Discrimination, which, as we already saw, follows from a truism that I assume everyone must accept⁶⁶. If that is correct, another kind of knowledge, which is not knowledge by description, is required in order to satisfy the Principle of Discrimination. The sort of knowledge that can be incorporated into Simmonds's

⁶³ Black, Max The Identity of Indiscernibles *Mind: A Quarterly Review of Philosophy*, Vol. LXI (1952) Issue 242, p. 153-164.

⁶⁴ O'Leary-Hawthorne, John The Bundle Theory of Substance and the Identity of Indiscernibles *Analysis*, Vol. 55 (1995), Issue 3, p. 191-196.

⁶⁵ Zimmerman, Dean W. Distinct Indiscernibles and the Bundle Theory *Mind: A Quarterly Review of Philosophy*, Vol. 106 (1997), Issue 422, p. 305-309.

⁶⁶ In his article, Simmonds refuses to engage with metaphysics. His argument is mainly epistemological (we can only *know* that something is the case by means of universals). He believes that this thesis about knowledge, that is explicitly defended in p. , makes the discussion on what sort of things really exist (universals, particulars or both) idle. It is perhaps ironic that the epistemological thesis that Simmonds believes is able to freed him from the need to engage with metaphysics, demands, at the end of the day, a particularly demanding metaphysical conception of the world in order to be justified.

incomplete epistemology in order to make it comply with the Principle of Discrimination is the sort of knowledge that Russell called 'knowledge by acquaintance'. As Russell puts it

I know that I am *acquainted* with an object when I have a direct cognitive relation to that object, i.e. when I am directly aware of the object itself. When I speak of a cognitive relation here I do not mean the sort of relation which constitutes a judgement, but the sort that constitutes a presentation.⁶⁷

The relation is one in which the subject is *affected* by an object. Or, as Paulo Faria put it, 'to know *a* by acquaintance' means simply that the mind 'be subject to an affection whose necessary and sufficient condition is the *contact* with *a*'.⁶⁸ The relation that holds between the subject and the object is, therefore, analogous to a causal relation. The mind is affected by a particular state of affairs.

Let me now take stock of the argument so far. I started by trying to rescue mercy from Simmonds' attempt to make mercy collapse into judgement and, in the process of objecting to Simmonds' argument, I premised an alternative conception of mercy. In this alternative conception, mercy is conceived as an action that is *caused* by the excitement of dispositions rather than an action that follows from judgement. This conception of mercy helps to render visible to us a different, richer, and more complex conception of human action, one in which human action can be conceived as springing from different sorts of sources, a conception that Simmonds' conception of mercy failed to take into account. That conception of human action hints at a much more complex conception of *moral* action and unveils a whole new set of problems on moral judgement, the most important of which is the problem of precisely what is the object of a moral judgement that praises or condemns an action that was *caused* by the excitement of someone's dispositions by certain states of affairs. In the next section, I shall give an explanation of how those actions can be conceived to be 'moral' and also an explanation of what precisely is the object of moral judgements on actions that are *caused* by the excitement of dispositions. However, the argument in the next section is not enough to prove that one is sometimes *not demanded to reason* before acting, for there seems to be at least one good reason to believe the contrary, namely: the (assumed) fact that reasoning brings about more certainty about what is the right thing to do. I shall dedicate the last section of this chapter to explaining why reason does not imply that reasoning is always best to reason

⁶⁷ Russell, Bertrand Knowledge by Acquaintance and Knowledge by Description, cit., p. 152.

⁶⁸ Faria, Paulo Discriminação e Afecção, cit., 148.

matters through.

The Value of a Moral Action and the Value of Moral Life

There is a strong objection to the thesis that there is no moral obligation to perform reasoning before acting. If it is true that reasoning is more likely to bring moral knowledge than plain acquaintance, acting only on the conclusions backed by reasoning would increase the likelihood of performing morally correct actions. However, this argument would be valid if and only if there are no actions which are morally required and whose performance should, as a matter of conceptual necessity, spring from something other than reasoning, e.g. the excitement of dispositions by the acquaintance with a particular state of affairs. In this section, I will consider which sort of argument would be able to support the claim that there are actions that cannot conceptually spring from reasoning (what I termed above 'particularity-dependent actions') and then move on to analyse the argument that moral certainty is a good enough reason to justify an overriding obligation to reason before acting.

Let me start by explaining what I mean when I say that some actions, as a matter of conceptual necessity, cannot be performed if preceded by reasoning. Think about the following example. Suppose Virginia is in love with Leonard. They have a date and Virginia is about to kiss Leonard. That is, the situation that constitutes the date (the good wine, exciting conversation, and everything else that might be part of the description of that particular date) is *affecting* her in a particular way: it is bringing her to Kiss Leonard. At that Virginia has at this moment a clear perception that it is worth trying to kiss Leonard and not worth retreating. But Virginia, as well as any of us, wants to do the right thing. And, as it happens, Virginia trusts her reason above everything else, which is what brings her to weigh all available reasons for and against kissing Leonard, before effectively doing it. Say that Virginia is a utilitarian and, therefore believes that the maximisation of pleasure justifies actions. After carefully analysing the situation, Virginia concludes that her pleasure and Leonard's pleasure will increase with the action of kissing Leonard. With this procedure, Virginia has obtained a strong reason to believe that the decision to kiss Leonard is correct. But Virginia has lost something while reasoning, to wit, her attachment to the concrete situation she was experiencing. Reasoning is, as Simmonds pointed out, a procedure in which we abstract from the situation we are experiencing in conceiving it. Virginia had to conceive herself and Leonard as human beings, and everything surrounding them as an exemplification of universal

concepts (chairs, etc.).

Notice that I am not claiming that Virginia cannot empirically kiss Leonard. My claim is even stronger: Virginia cannot *logically* kiss Leonard. She could touch Leonard's lips with her own, but some of the characteristics of what we call 'kiss' would be missing, like some feelings (tenderness, sexual arousal), and perhaps even some physical reactions (a fluttering heart). The trouble with providing any argument to support the claim that a real kiss cannot be preceded by cool reasoning is that there are at least certain concepts that cannot be explained in such a way that the explanation is enough for the listener to acquire the concept. As we saw above, teaching the concept would mean to train someone in an aspect of what Wittgenstein called a form of life. In such cases, one can just trust that the other interlocutor shares the concept, otherwise, both interlocutors would be talking passed one another (I trust that the reader agrees that Virginia's kiss lacks something).

What about moral actions? Is it the case that there are particularity-dependent actions that one should morally perform? Actions such as showing mercy, forgiving or making sacrifices seem promising candidates to be actions of just that sort, if for no other reason than the insistence of a significant part of the literature that those sorts of action are somewhat dependent on the particularity of the situation⁶⁹. If this is correct, to give money to a beggar could be considered a merciful action, but only if some conditions that go further than the material act are also fulfilled. In order to qualify this action as merciful a specific kind of experience would have to be part of the action, namely, the experience of being directly affected by the pain felt by the beggar. If one starts wondering about the reasons why one should give money to the beggar and concludes that it is correct because it is an act towards a better distribution of goods in society, this experience would be gone. This action could be considered, say, *just*, but it would not be possible to call it *merciful* anymore. If this is correct, we would have the same action in physical terms, but in terms of its moral description, this action would not be considered merciful without the agent's attachment to her experience. Merciful actions (as well as making some sorts of sacrifice, or forgiving) would happen out of a response to this sort of affection.

⁶⁹ On that see Christodoulidis's The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular *passim*; see also Zenon Bankowski's forthcoming book *Living Lawfully*, particularly chapters 7, 8 and 9. In his article Law as Practical Reason (*Cambridge Law Journal*, Vol. 48, Issue 3, p.436-471), Michael Detmold expresses a more radical view according to which all practical judgements (from which he excludes hypothetical moral judgements) would be subject to what he calls the 'particularity void'.

If I start reasoning before doing it, I would not be in the realm of mercy anymore, it doesn't matter if I decide to give the money or not, for my *passivity* would have been substituted by an *active* propositional grasp on the situation. If what was morally required in the specific circumstances was an act of mercy, the agent who reasoned would have made a mistake. That a distinction between actions caused by the excitement of dispositions and actions caused by willingness to abide by the conclusions of reasoning is conceptually possible was the main contention of the arguments put forward in the first part of the chapter. The question that remains to be answered is whether or not there are good reasons to suppose that the distinction is morally relevant.

A clue about which sort of argument would be needed in order to provide an answer to this question may be found in Aristotle's proposed difference between the encratic and the virtuous agent, to which I made reference above⁷⁰. The encratic agent *knows* which sorts of situations require which sorts of actions and he is both fully capable of inference and fully committed to doing what the conclusion of his reasoning affirms to be the right thing to do. The virtuous agent does what is good because she has the right inclinations (including, arguably, the inclination of engaging into reasoning in some circumstances). But why is the virtuous agent morally better? Presumably, because it is better to have the right inclinations than not to have them. If a certain state of affairs fails to *cause* an action that would say something about the *kind of person* the agent is. One's character would not be *the sort of character* that works as the medium through which the causal link between a particular state of affairs and a particular action obtains. One can either fail to *acquire direct knowledge*⁷¹ or else one can acquire direct knowledge but *not have the disposition of character* that combined with an awareness of the situation, would bring the action to be performed. One is then tempted to answer that the reason why it is morally relevant to make a distinction between particularity-dependent actions

⁷⁰ See note 9.

⁷¹ If someone doesn't have the capacity of acquiring direct knowledge of some particular situations, she might be criticised for lacking that 'loving attention' that Iris Murdoch thought so central in morals. Bankowski and Mungham show how this lack of attention may lead to mistakes and, moreover, how it can lead to moral mistakes as when it is part of 'degradation ceremonies' (of which court-room procedures are an instance). To pick just one example of a trivial mistake, they mention a story concerning the relation between upper class gentry and their servants. A servant reports that after a meal the guests all started discussing particularly damning gossip about the royalty. One of the guests remarked that they should be careful not to be overheard, to which another convivial retorted that there was no danger, for they were alone in the room, although at the time there were three footmen in the room (see Bankowski, Zenon and Mungham, *Geoff Images of Law* London: Routledge & Kegan Paul, 1976, p. 87 ff.).

(such as mercy) and actions that spring from the willingness to abide by the conclusion reached by means of reasoning is the fact that one of the primary objects of moral judgement is the kind of person the moral agent is. It would seem that in order to show the moral relevance of distinguishing particularity-dependent actions from reasoned actions, all that is required is to provide an argument for the moral value of some features of character that are necessary and sufficient conditions to bring the particularity-dependent actions about.

However, this argument would not be enough to justify that one is sometimes *morally required* to perform actions that are conceptually incompatible with reasoning and, consequently, for the reasons put forward above, it cannot work as an argument for the thesis that reasoning is sometimes not required. What the argument shows is simply that those who perform particularity-dependent actions necessarily have certain features of character. But that does not mean that those who do not perform those actions because they decide to reason before acting do not have that disposition of character. Perhaps they do have such dispositions but try to keep them in check so that they can reason and be absolutely sure that what they are doing is correct (which would make sense if one assumes that moral reasoning is more likely to lead someone to the right *opinion* about what is the right thing to do).

In order to prove that particularity-dependent actions are sometimes morally required, an additional argument is needed, namely, an argument for the thesis according to which one criterion for a successful life is that it has a place for *spontaneity*. Susan Wolf provided a general explanation of why spontaneity might be required in leading a healthy and fulfilling life⁷². In a nutshell, her argument is that both utilitarians and Kantians⁷³ can never learn to play piano or enjoy a Waldorf salad just because they want to learn piano or because they are craving for a good salad. They might or might not do those things but they will only do it because the action can be described as a 'contribution to the general happiness' (or, in the case of Kantians, as 'manifestations of respect for the moral law'). In this respect, both utilitarians and Kantians always have 'one thought too many' (to use Williams's expression)⁷⁴. The distinction between the two ways to learn piano (as an action towards increasing happiness/obeying the moral law and as an expression of taste for the learning of a musical instrument) is *conceptually* relevant because, as Susan Wolf puts it:

⁷² Wolf, Susan *Moral Saints* *Journal of Philosophy*, Vol. LXXIX, Issue 8, pp. 419-439.

⁷³ Wolf, Susan *Moral Saints*, cit., p. 431.

The requirement that the utilitarian [or the Kantian,] have this thought – periodically, at least – is indicative of not only a weakness but a shallowness in his appreciation of the aspect in question⁷⁵.

And, as she also pointed out, that lack of appreciation might make of the agent a moral saint, but the agent would also become a less interesting person as would, if we were all moral saints, the world. Although I believe that those insights will help to explain why spontaneity is important for an agent to live a fulfilling life, arguments such as those put forward by Williams and Wolf are often related to the project of justifying a limit for the hold morality should have on the moral agent. For instance, the idea that moral saints might be uninteresting (indeed, unbearable) leads Wolf to propose that ‘moral ideals do not, and need not, make the best personal ideals’⁷⁶. But in order to do so Wolf rejects the Aristotelian alternative in which those ideals of deep appreciation for playing the piano and, I might add, of deep concern for someone else’s pain could be incorporated into a *moral view* of the agent’s character⁷⁷. But, if we put aside the controversy about the breadth of application of the term ‘moral’, the argument put forward by Wolf aims at establishing a point very similar to the one about the need for spontaneity in a morally worthy life, namely, the point that always acting on moral reasons prevents the agent from *being* a certain kind of person that it is worth trying to be. From this point, Wolf derives that there may be other reasons that guide people to do certain things, reasons that she connects to the non-moral ideal of personal perfection. But the same argument also explains why sometimes it *is better* that one does not take a consciously reasoned decision to perform a particular action.

From the conclusion that those traits of character are to be valued that show a character where deep and direct concern for, say, the pain of other people, has a place, a number of problems follow. The problem of the extent to which one should act spontaneously and how to train oneself to show that sort of deep concern when it is required and to reason when that is appropriate. One might see those concerns as referring to two central elements of a doctrine of prudence. A complete answer to those problems is redundant in the context of my argument, but one aspect of such an answer might prove relevant in order to defend the arguments I

⁷⁴ Williams, Bernard Persons, Character and Morality in Rorty, Amelie *The Identities of Persons* Berkeley: University of California Press, 1976, p. 214.

⁷⁵ Wolf, Susan Moral Saints, cit., p. 430.

⁷⁶ Wolf, Susan Moral Saints, cit., passim, but especially p. 426.

offered for moral agents not to reason against the obvious objection that, if the agent should not reason matters through, the arguments I am putting forward in this chapter too should not be taken into consideration by the agent when deciding what to do. One reason why this chapter's arguments might be relevant for the decision maker is the fact that one might acquire prudence (i.e. one might develop a morally required affection) by reasoning on *past* actions and, in doing so, learning from one's mistakes and successes.

More importantly than those problems, however, is what there is to be gained from the conclusion that traits of character are to be valued in themselves as morally good or bad. First of all, reasons that inform a moral judgement on the agent's *character*, (i.e. that inform a judgement on which sort of *moral person* an agent is) would also apply (if only derivatively) to *action*. The connection between the judgement of character and the judgement of action is evident if we concentrate on actions such as merciful actions whose performance requires that a disposition of character be excited. The modern conception of the human being as an empty vessel essentially composed of capacities to reason and to will is blind to the other morally relevant features we have⁷⁸. If our only morally relevant features were effectively our rationality and our will, all decision-making that is morally correct would be a result of the exercise of our rational capacities. By reasoning at every opportunity we would be asserting our only moral (indeed, human) feature, namely, our reason. When the only method of decision-making is to reason, and the only virtue is to be rational, deliberation on the *character* loses its point. Not surprisingly, modern philosophers seemed to have thought that the primary object of moral judgement is *action* and not *character*. Concepts such as mercy might help us to unearth a richer conception of the human which is, as it were, asleep underneath our modern prejudices. They help because they still bear witness to the fact that there are other morally relevant features in human character. If my thesis is correct, the task ahead is to explain which role each sort of decision-making method is to play in the life of the good person.

⁷⁷ Wolf, Susan Moral Saints, cit., p. 433; in this respect she follows Bernard Williams's earlier article on the clash between personal reasons and moral reasons presented in Williams, Bernard Persons, Character and Morality, cit., p. 210-215.

In presenting this explanation for the value of not acting on moral reasons, my main concern is not to offer a complete defence of the thesis that, even under the assumption that moral reasoning can increase certainty, there is no all-pervasive obligation to reason before acting. I am more concerned with identifying an argument that *is able* to justify that reasons are not to be assigned an all-pervasive role in moral decision-making, but should share the stage of moral decision-making with dispositions of character. The argument that would be able to justify that more restricted role for reasons in moral decision-making involves two separate premises, to wit: a) the thesis about *moral judgement*, according to which entire moral lives are a legitimate object of moral judgement and b) the thesis that *spontaneity* is a necessary element of a successful life. Although I believe that the argument provided by Wolf is enough justification for those theses, I would not need to provide those arguments in order explain how reasoning *could be* conceived as not being all-pervasive in moral reasoning. Furthermore, I do not need to prove the two theses above in order to explain why those arguments do not apply to public agents, even if they were valid.

In the next chapter, I take on the task of providing an argument to explain why those arguments which might be able to justify an obligation not to reason in some private contexts, would not be enough to justify that public agents be excused from reasoning . But before engaging with the problems concerning public agents' reasoning, let me first explain under which conditions the arguments presented in this section might be enough to justify that one is not always obliged to reason in one's private life, even under the assumption that moral reasoning is the best way to learn what is morally required.

Moral Certainty and the weight of one's own moral success

Let us suppose, for the sake of the argument, that reasoning always increases the certainty about which particular action is morally required. Hampshire summarises the argument:

“Following Aristotle, this defender of rationality of the traditional kind will argue that the policy of evaluating explicitly every consideration influencing

⁷⁸ A critique of that conception of the self is by no means new. Communitarians have heavily criticised it (e.g. Sandel, Micheal *Liberalism and the Limits of Justice* Cambridge: Cambridge University Press, 1982, p. 179) as did certain feminists (e.g. Friedman, Marilyn *Feminism and Modern Friendship: Dislocating the Community Ethics* 99, January/1989, *passim*, esp. p. 145-147. I am just adding my voice to theirs by trying to show the distorted conception of decision-making that springs from the modern conception of the self.

him is a guarantee against confusions about the ends of action, misleading associations, subjective impressions, sentimental prejudice and superstition; and this is a sufficient vindication of traditional rationality in moral reasoning, quite apart from the occasional necessity of publicly defending a decision. The more careful and methodical the deliberation before action, with an explicit reviewing of arguments and counter-arguments, the less likely a man is to be misled by received opinions and mere confusions of thought.”⁷⁹

If reasoning does indeed provide more certainty wouldn't it be the case then that it is always good to reason before acting? A preliminary answer to this objection would be that if, at the end of the reasoning process, I were to reach the conclusion that the required action is an instance of a moral action which is not incompatible with acting for reasons, it would turn out that opting for reasoning was a good move. On the other hand, if I reach the conclusion that the right thing to do is to perform one of those actions which, like mercy, are not compatible with reasoning, I have acted so as to destroy the possibility of doing what I should have done. But my objector could then press the point by arguing that if one knows that mercy is the required action in the particular circumstances, one would also be aware of what would be the desirable material outcome⁸⁰. From the assumption above that reasoning brings more certainty about which action is required, it would then follow that reasoning brings more certainty about what is the morally desirable material outcome. If one were determined to achieve the morally recommendable 'material outcome' it would be, therefore, advisable to reason the matter through. Now suppose that the morally desirable material outcome is in someone else's interest. If I decide not to reason the matter through, I am risking the actualisation of the morally desirable material outcome which will benefit someone else in order to achieve a purely personal gain, namely, to make my life morally more successful. My objector would conclude that my argument implies that, in order to be good, one has to put one's interest in achieving a better life ahead of anyone else's interest on material outcomes.

⁷⁹ Hampshire, Stuart Public and Private Morality In S. Hampshire (ed.) *Public and Private Morality* Cambridge: Cambridge University Press, 1978, p. 36.

⁸⁰ By 'material outcome' I mean what Aristotle meant by *Dikaion*, that is the justice of the state of affairs, without reference to the *subject* that brought about the state of affairs (when an action is said to be just also because it was brought about in the right manner, the word used by Aristotle is *Dikaiosine*. For further explanation on the distinction between the objective and the subjective aspects of all virtues, see Gauthier, R.-A. Jolif, J.Y. *Étique à Nicomaque: Introduction, traduction et Commentaire* Vol. 2 Louvain: Publication Universitaire de Louvain, 1959. Specifically about the objective aspect of justice (*Dikaion*) as opposed to its subjective side (*Dikaiosyne*) see pp. 333-369.

The first line of reply to this objection is to deny one of its assumptions, namely, the assumption that reasoning can always (or at least in most cases) increase moral certainty. Such an argument could be based on a conception of how to assess moral correctness, according to which a given way to assess moral correctness, paradigmatically intuitions, is unconditionally superior to reasoning. Alternatively, it could be based on a conception of how to assess moral correctness according to which neither reasoning nor intuitions have *in principle* priority over one another as means to assess moral correctness. This is the conception of good moral judgement held by Stuart Hampshire. In *Public and Private Morality* Hampshire says that:

As abstraction has its natural and proper place in reasoning, so does its contrary, which is the mind's openness to a great range of largely unexpected observed features of a situation all of which are allowed to influence the response⁸¹.

Both these conceptions succeed in accounting for the not-too-rare feeling that reasoning cannot add anything (even certainty) to a moral belief brought about by other means (intuitions are again the paradigmatic means). Such an attitude could only be justified if an intuition has a better moral claim to correctness than reasoning, at least in some circumstances. The first conception seems to be less feasible because it cannot easily account for yet another experience, namely, the experience of being convinced by argument. Although the second conception can account for rational persuasion it has the further burden of explaining just in which contexts each of the methods is best.

Of the two arguments offered by Hampshire, namely the argument of the inexhaustibility of descriptions⁸² and the argument based on the existence of moral conflicts, neither offers a clear answer to the problem of when each method should prevail. Indeed, if the arguments for the existence of moral conflict succeed, not only reasoning has no answer to the moral dilemma, but intuition also cannot point to the right answer. In cases of real moral dilemma, intuitions are, at most, a way out of the impasse but never a morally safer way than reasoning, for what is characteristic of situations of moral dilemma is that there is not one right solution. But, even

⁸¹ *Public and Private Morality*, p. 37.

⁸² Hampshire uses the expression 'practical reasoning' to refer to what I have called throughout this thesis 'practical decision-making'. This means that, in Hampshire's concept of practical reasoning, methods of judgement that do not rely on explicit argument are also instances of practical reasoning. In what follows, I shall use my own terminology to avoid confusion.

if Hampshire is circumscribing the notion of a dilemma to the situation in which there is a right moral answer although one cannot reach it through reasoning, there is no reason in principle to believe that intuitions are much more reliable than reasoning. My intuition could be simply an expression of prejudice and, without the backing of reason, it would not be easy to distinguish moral intuitions from those prejudices. The argument of inexhaustibility also falls short of providing such an answer. According to this argument, the features of a particular case, which are indefinite in number, 'are not easily divided into the morally relevant and the morally irrelevant'⁸³. No argument, we are told by Hampshire could prove that, but accumulation of examples through story-telling will reinforce this belief. Now, it is not clear what Hampshire wants to get at with his argument, but I assume that what he wants to get at is that this difficulty makes reasoning useless for the case, while intuition, because it does not need explicitness, can just 'recognise' the relevant features and inform judgement in a non-conscious way. But, again, the problem is why I would trust my moral intuition if I cannot differentiate it from my prejudices, preconceptions, superstitions, etc.

I shall not pursue the matter further for there is yet another answer to the "selfishness objections" which does not depend on denying that reasoning is a better method of assessing moral correctness and which bears on the argument of the second and third chapter. But let me first introduce another possible answer whose range of application is frustratingly limited and which I wouldn't like to be confused with my soon-to-be-exposed, hopefully more useful, answer. One might argue that there are indeed cases in which putting one's personal moral aims first does not jeopardise the coming about of the morally desirable state of affairs, for this state of affairs could, at least sometimes, be reached by means of another action by the same agent which could be performed *ex post facto* or by some not significantly costly effort by the beneficiaries. If I live under a wonderfully efficient welfare state and I know that a beggar could at any moment and with little effort be granted the reasonable standard of living which I am trying to bring about by giving him alms, being more certain of what is the required action would not make any difference to the perception of the morally desirable outcome. In situations in which the only one with a legitimate interest in the material outcome is the agent herself, there is also no reason to believe that the agent who refuses to reason is being selfish.

⁸³ Hampshire, S. Public and Private Morality, p.39

The line of reply I am particularly interested in is an argument against the absoluteness of altruism. I claim that even when there is an interest by someone else in the specific material outcome, those interests would have to be weighed against my own interest in leading a morally successful life. I believe that sometimes at least the interest of the agent would prevail in the balance of reasons. The argument I shall use in order to support those claims has a broader scope: it is an argument against the very idea of systematic priority (the absoluteness) of a moral value. A version of the argument I have in mind was recently put forward by Charles Taylor and I shall call it the 'argument of importance'. A full presentation of this argument will have to wait until the second chapter, but let us now briefly consider what would follow if it really succeeds in proving that there is no systematic priority among moral values. It would follow that the absolute priority of altruism cannot be justified. If this is true, it is conceivable that in particular instances one might think first on one own moral growth even if that means to put in risk someone else's right.

But my hypothetical objector could argue that my argument leads to uncomfortable conclusions: if the best way of knowing whether or not my interest on my own self-improvement is worth the risk of someone else's interest is reasoning, and reasoning is precisely what would be vetoed if my interest in my self-improvement were to prevail in the particular case, there is no fail-proof way to do what is morally best. That is true, but it is hardly an objection to my argument. There is no *a priori* reason why morality must be accompanied by a fail-proof method of decision-making, no guarantee that decision-making involves no moral risk. I believe this risk to be the source of one sort of moral tragedy. A moral tragedy in which a choice has to be made, not only based on incomplete information, but in which the gathering of information destroys the context in which the choice makes sense and, consequently, the very point of gathering the information. This is a tragedy a moral agent lives countless times over her lifetime, without being even aware of it.

A summary of the Argument

Before we move on to the next chapter, let us first take stock of the argument so far. This chapter aimed at making more plausible the suggestion that the way an action comes about can be morally relevant and, more specifically, that sometimes one is not required to reason before acting. Simmonds' arguments for the conclusion that mercy is always preceded by judgement provided me with an ideal initial target, for they amount to a justification of the

thesis that moral action is necessarily connected to reasoning. In objecting to his argument, I hope to have been able to show that there aren't good reasons to believe moral actions *tout court* to be always preceded by judgement. It would also follow from my argument that there can be differences between moral actions, depending on their antecedents. The first step in objecting to Simmonds was to refute the thesis according to which moral actions cannot have causes. The second step was to deal with an epistemological argument offered by Simmonds for the conclusion that regardless of what brings about action (for our purposes, causes or reasons), action is always preceded by propositional knowledge of the universal features of a particular situation. I objected to his argument and concluded that either his epistemological argument would contradict the truism from which we derived the Principle of Discrimination or it would need to be complemented by a very demanding metaphysical conception of the world according to which there are no such things as particulars in the world.

That, however, was not enough to explain why the distinction between particularity-dependent actions and actions that spring from reasoning is morally relevant. I then returned briefly to the point previously mentioned that the reasons why caused action can be morally relevant is the fact that their performance depends on traits of character. But that wasn't yet enough to conclude that there are situations in which one is morally required not to reason. The sort of argument that would be required in order to justify that there is no pervasive obligation to reason before acting was sketched and, finally, I tried to explain why those arguments, if true, would explain why no overriding obligation to reason before acting can be derived from the fact that moral reasoning is more likely than any other method (say, moral intuition) to bring us to the right conclusion about what is morally required.

Having, in the first chapter, identified the proper place for actions that spring from dispositions of character in moral decision-making I shall, in the next chapter, consider the problem of why public agents, or at least certain sorts of public agents, are obliged to always act on the conclusions of reasoning processes. After settling the problem of *why* public agents, differently from other moral agents, are always obliged to reason, I move on in the three last chapters of this thesis to face the problem of *how* should public agents reason.

Chapter Two: Reasoning in public and private contexts

“Agamemnon, never should this thing have been,
that words with men should more avail than deeds
But good deeds should with reasonings good be paired
and baseless plea be ranged by caitiff deed
And ne’er avail to gloze injustice o’er”
(‘Hecuba’ 1187-91)

We concluded the last chapter by showing how a particular kind of reason for action could defeat the thesis that one should always reason before acting, even if one accepts that reasoning brings more certainty about the morally correct course of action. In the present chapter I turn to the problem of whether or not reasons of that kind can justify that a public agent is not obliged to reason before acting in the exercise of her public office. Notice that this is different from the question of whether or not the public agent has an obligation to publicly present reasons that support her actions. The two obligations are logically independent: from the fact that a public agent is legally, morally or politically required to publicly present reasons for a decision taken, it doesn’t follow that she has a reason to decide the matter through reasoning. When Wasserstrom proposed the distinction between discovery and justification he was making the point that the obligation to justify the decision (publicly or privately) doesn’t imply anything about the process of discovery which might depend, as Holmes famously phrased it, on what the judge had for breakfast. Conversely, the fact that a public agent is obliged to decide matters through reasoning does not imply that she has an obligation to make those reasons public.

To state my conclusion in advance: it is not possible to justify that public agents (or at least some sorts of public agents) be justified in not reasoning when deciding on the use of their public power. The reason why public agents should always reason before acting is related to what I believe to be the most important peculiarity of contexts of public decision-making, to

wit: public decisions are subject to a stricter requirement of impartiality. I take my cue in explaining what a 'stricter' requirement of impartiality is and the justification for this stricter impartiality from the familiar problem of whether or not public agents are bound to have morally dirty hands. The apparently nonsensical idea of a 'stricter impartiality' can be explained with the help of a distinction between agent-relative and agent-neutral moral reasons. With a clear idea of what exactly the stricter requirement of impartiality is, it becomes easier to ask whether or not there are reasons to believe that public agents should be obliged to guide their decision-making by this stricter requirement of impartiality. Having established that there are reasons to believe that public moral agents, but not private moral agents, are morally required to be impartial in a qualified sense, I move on to consider whether or not this peculiarity of public morality has any influence on the *morals of public decision-making*. I then try to show how the special sort of impartiality required in public contexts rules out arguments of moral self-improvement which, as we saw in the last chapter, is precisely the kind of argument that might justify a moral agent not to reason, under the assumption that reasoning is the best way to learn what is the morally required thing to do. I then deal with some possible objections to my argument, so that we can more safely conclude that public agents are always obliged to decide based on reasons chosen in the most rational way, that is in the way which is most likely to lead the agent to the right opinion about what is the morally required action in the instant case. But I don't face directly in this chapter the question of the most rational way for public agents to choose reasons for action (i.e. the most rational reasoning process). The last three chapters of this thesis will deal with one of the central problems concerning the best way to reason matters through in public contexts, i.e. the problem of whether or not some reasons should be excluded by kind from the reasoning performed by public agents in decision-making contexts.

Public Agents' Dirty Hands

One of the greatest differences between the ancient and the modern ethical experiences is an increasing awareness of the separation between public and private morality. The intuition of a difference between public and private morality is apparent in the fact that often moral judgements differ on two actions which are identical in all respects but for the public or private nature of the context in which they are performed. If someone takes a loan from a friend in order to buy a house, it would be commonly regarded as natural that there is in principle no need for the borrower to tell anyone about the loan. If, however, a shadow

minister takes that same loan from a fellow shadow minister and, when they come to government, the borrower's office is in charge of investigating whether or not the lender's business breached company law, the situation might be different. A common way of criticising Peter Mandelson's conduct in the affair that led him to resign in 1998, even by those who accepted that he had not interfered with the investigation of Geoffrey Robinson's commercial enterprises, was to say that he had an obligation to disclose the loan¹. On the other hand, one's public persona seems not to be vulnerable to evidence of some sorts of private vices. One who holds that a self-confessed cheater on his wife and a regular poker-faced liar is a good president would not necessarily be perceived to be holding contradictory opinions. In philosophy, the problem is often phrased in terms of whether or not the politically justified course of action is always consistent with the morally demanded course of action or, in other words, whether or not good politicians are bound to have dirty hands². In short, there seem to be a discontinuity between public and private contexts for, in public contexts, some moral restraints that apply to private contexts seem to be suspended and other restraints that are not to be found in private contexts seem to be introduced.

For many years, the two predominant moral theories, namely utilitarianism and Kantianism, agreed that there was nothing worth learning about morality in this intuition of discontinuity between morality in private and public contexts. Kant's famous remark that "Politics says: 'Be ye therefore clever as serpents'; morals adds (as a limiting condition): 'and guileless as doves'"³ is an answer to those who saw a real moral problem behind our intuition of discontinuity. I believe that the reason why Kant couldn't see any moral insight behind this intuition is a feature of his thinking that he shares with utilitarians, namely: both approaches

¹In 1998 the allegations were made that the Paymaster General, Geoffrey Robinson, had businesses that breached company law. The matter should result in an investigation by the Department of Trade and Industry, which was run at the time by Peter Mandelson. By the end of 1988, it emerged that, before the Labour government came to power, Peter Mandelson had borrowed from Geoffrey Robinson a substantial amount in order to buy a house. Peter Mandelson, although claiming never to have had any influence on the investigations, resigned.

²The question is at least as old as Machiavelli's *Prince*. Machiavelli's recommendations to the prince are aimed to help bring about a necessary condition for the exercise of power by the prince, namely, that the prince remain in power. But Machiavelli seems to believe that in order to remain in power the Prince might have to perform actions that are themselves morally questionable: a Prince might need to convince people that he has qualities he does not have (as, for instance, in chapter XVIII of Machiavelli, Niccolò *Il Principe e altre opore politiche* 14^a ed. Milano: Garzanti, 1994, p. 68).

³Kant, Immanuel *Toward Perpetual Peace* in Gregor, Mary J. (ed) *Immanuel Kant: Practical Philosophy* Cambridge: Cambridge University Press, 1996, p.338.

to moral theory take the problem of the ultimate criterion for moral correctness to be by far the most important subject in moral investigations (be this ultimate criterion a categorical imperative or be it the utility principle)⁴. If that is all there is to moral philosophy, the experience of conflict between public and private moral requirements would only be morally relevant if it carried an insight on matters directly related to the ultimate moral criterion. Under this key of interpretation, Kant took the problem of dirty hands to be connected to the perception of an insoluble inconsistency between public and private moral requirements (or, to phrase it in Kantian terms, between politics and morality) and that would be tantamount to denying that an ultimately consistent moral criterion could offer safe grounds to answer all moral questions⁵. Theories which, like Kantianism and utilitarianism, claimed to have found the one single ultimate moral criterion, whose satisfaction always authorises action, are inconsistent with this interpretation of our intuitions of discontinuity between public and private morality and, therefore, have to deny that there is any truth behind those intuitions. The same goes for some metaethical arguments (often inspired by Kant) that claim that the very idea of a Moral Dilemma's in politics does not make sense⁶. If the perception of discontinuity between public and private moralities hides no moral insights, perhaps the best explanation for the intuition that public agents have 'dirty hands' is that the 'intuition' bears witness to a prejudice against politics and politicians. What needs be asked is whether or not, given the assumption that public and private moralities are ultimately consistent, there is anything morally relevant to be learned from the intuition of discontinuity between public morality and private morality. After all, it may be that the intuition does not stem from any philosophical insight, but rather from that deeply ingrained prejudice against politics and politicians.

I believe that there is an important moral insight behind the intuition of discontinuity: the intuition of discontinuity between private and public morality can be understood not as pointing to a fundamental inconsistency in moral life, but as being about the different methods

⁴ I leave aside here the question already dealt with in the preceding chapter of whether this ultimate criterion could be applied independently of other moral skills.

⁵ Kant argues against the disagreement precisely by pressing the point that morality and politics are not inconsistent, but that moral propositions such as 'honesty is better than all politics' are above all objections and is 'indeed the indispensable condition of all politics' p. Kant, I. *Towards Perpetual Peace* cit., p.339

of *decision-making* morally allowed in public and private contexts. It is not a coincidence that neither the categorical imperative nor the utility principle are usually applied reflexively. The decision-making processes of following the conclusions arrived at through an application of either of the alternative principles is not itself subject to those principles. I claim that if we were to apply substantive moral criteria to processes of decision-making we would find that there is a difference between the processes of decision-making which are *morally allowed* in public contexts and the methods of decision-making which are *morally allowed* in private contexts. If this is correct, there may be a philosophical insight about the morally appropriate methods of decision-making in the common perception that public agents are bound to have dirty hands.

In recent years, many philosophers have concentrated on the study of morally appropriate methods of decision-making. Some of those philosophers, notably S. Hampshire⁷, T. Nagel⁸ and B. Williams⁹, have tried to explain the intuition that public agents are bound to soil their hands as an insight on the fact that sometimes the same (sort of) reason is allowed different weights depending on whether the context in which the decision is taken is private or public. According to Nagel, for instance, moral decision-making abides by canons that could vary depending on the public or private nature of the context. There are different ways in which moral decisions could be taken and, furthermore, there are ways that are more appropriate to particular contexts than others. Take the need for consequentialist calculus, for instance: some sorts of decisions should be taken in a more consequentialist manner, while others do not require thorough consequentialist calculus as, for instance, those decisions based on arguments in respect of rights. There are indeed considerations that seem to be very weighty in some kinds of contexts but would not be as important in other sorts of contexts. Observe that the claims that there are different styles of moral decision-making which may be morally required in different situations and that, as a consequence, similar reasons may have different weights depending on the contexts in which the decision is taken are both consistent with

⁶ Cf. e.g. Peter Bauman's *Dirty Hands or Sticky Fingers? On the Idea of Moral Dilemmas in Politics* in: Peter Kampits et al (eds.): *Applied Ethics* Volume VI/2 of the series "Contributions of the Austrian Ludwig Wittgenstein Society". -- Kirchberg am Wechsel: ALWS, 1998, pp. 63-67

⁷ Hampshire S. *Public and Private Morality* In S. Hampshire (ed.) *Public and Private Morality* Cambridge: Cambridge University Press, 1978, pp. 23-53

⁸ See especially *Ruthlessness in Public Life* in: *Mortal Questions* Cambridge: Cambridge University Press, 1991 pp. 75-90 and *War and Massacre*, idem, pp. 53-74

saying that there is an ultimate criterion according to which either a decision or an action can be said to be right or wrong. This is so for either of two reasons. On the one hand, if my argument in the last chapter is correct and the process of decision-making is a morally relevant feature of an action, a theory of morally correct decision-making would have to be incorporated into a theory of morally correct action. I shall provide a more elaborate account of the relation between the moral correctness of processes of decision-making and the moral correctness of actions in the fourth chapter. On the other hand, if one accepts that there is no one safe method always available to human beings which would bring them always to perform the correct action (and this could be justified in many different ways such as calling attention to the fact that we have a limited knowledge of the consequences of our actions, or to the weakness of our will), a theory of the safest ways to decide would be needed and nothing in advance guarantees that all situations would always demand the same method of decision-making. If it is true that there are different valid ways of deciding morally and that the way in which one decides what to do is morally relevant, the question of which ways are appropriate in which contexts becomes morally interesting. This chapter's argument is an attempt to establish some of the morally relevant differences between private and public styles of decision-making, especially concerning the moral obligation to use reasons as grounds for decisions.

The investigation I undertake in this chapter is related, and also owes a great deal, to Thomas Nagel's analysis of the peculiarities of public morality¹⁰. Perhaps the best way to start to expose my argument is to present Nagel's conclusions. He concluded that there is indeed a difference between private and public contexts concerning the sorts of considerations which are morally relevant. In public contexts, some action-centred requirements are relaxed, like the prohibition to lie, while others are introduced or strengthened, such as the moral obligation to be impartial¹¹. Also, and partly as a result of the loosening of some moral requirements, consequentialist considerations become more relevant in public contexts¹². Although Nagel says little about the strengthening of the requirement to act on reasons in public contexts, we shall see that his argument and his conclusions are connected in many respects to mine and

⁹ Williams, Bernard *Politics and Moral Character* in: Hampshire, Stuart *Public and Private Morality* Cambridge: Cambridge University Press, 1978, p.55-73.

¹⁰ Notably in Nagel, Thomas *Ruthlessness in Public Life*, cit.

¹¹ Idem, p. 82.

¹² Idem, p. 84.

that they actually reinforce each other. In order to introduce my own argument, let me start by presenting the reasons why Nagel believes that the difference between public and private contexts is morally relevant.

To begin with, public decisions are often taken in the context of institutions which are designed to serve purposes that are different from the purposes of particular individuals in at least two respects. First, public institutions do not have private lives¹³ and, therefore, cannot have personal purposes (such as having pleasure). Secondly, because they are normally a result of pooling resources, institutions tend to be more powerful than individuals and, for that reason they can aim at larger objectives which are not feasible given the amount of power individuals and small social groups such as the family can have¹⁴. Indeed, achieving those aims that cannot be achieved by individuals alone seems to be one of the main reasons why the existence of public institutions is justified.

Another difference between the contexts in which public decision-making is performed and contexts in which private decision-making is performed is the fact that the conclusions arrived at through the former are normally backed by considerably more power than the conclusions arrived at privately. If this is correct, it follows that decisions taken in public contexts are more likely to cause detriment to a significant number of interests of those who are subject to the decision-maker's power. In other words, it is likely that many more interests hang in the balance when public decisions are taken. Of course there are decisions which are not taken by those who occupy public positions and that are also likely to affect a significant number of interests, but that is hardly an objection to my point. Decisions taken in the context of some international corporations are also likely to have a huge impact on those subject to their power and indeed that is a reason to demand that their decisions also take into account public considerations. The similarity between those decisions and decisions which are strictly public (performed in the context of a public institution) is a reason to believe that whichever conclusions about the morality of decision-making are to be derived from the likelihood of many interests being affected would also apply to the former.

Of course, those are not the only peculiarities of contexts of public decision-making. There are also problems concerning the attribution of moral responsibility which arise from the complex

¹³ *Idem*, p. 83.

¹⁴ *Idem*, p. 83

division of labour normally involved in public decision-making and execution¹⁵ and there are also problems concerning duties of representation that public agents have, especially in democratic states (although some would argue that those duties arise in whichever political regime¹⁶). The latter are not as relevant for this chapter's argument and, consequently, I shall concentrate on the first two peculiarities of public decision-making contexts. I shall come back to the peculiarities of the context of public decision-making's in what follows in order to connect Nagel's insights to some of my own conclusions about the morality of public decision-making. Before we move on to that, I shall explain what I believe to be the chief moral peculiarities of public decision-making. In order to do so, let me again start by presenting Nagel's conclusions on the matter.

Nagel believes that the distinctive features of the contexts of public decision-making presented above (peculiar institutional purposes, etc.) imply that decision-making in public contexts requires "both a heightened concern for results and a stricter requirement of impartiality"¹⁷. What is not clear from this formulation is how a moral agent can be more or less impartial. Studying the relation between those two moral peculiarities of public decision-making (consequentialism and increased impartiality) is a safe way to better understand what is meant by the apparent oxymoron 'stricter impartiality'. Consequentialism, says Nagel, is kept in check in private contexts by deontological requirements of action, of which "thou-shall-nots" are the most common example. That an action is, in itself, morally forbidden may be a reason for an agent not to perform it, in spite of the dreadful consequences which may follow if the action is not performed. Bernard Williams gives a number of examples of such situations, the most dramatic of which is perhaps the one in which the killing of an innocent man will result

¹⁵ On public responsibility see Thompson, Dennis F. *Political Ethics and Public Office* Cambridge/MS: Harvard University Press, 1987, esp. chapters 2 and 3.

¹⁶ On the representative nature of all political enterprise see Roermund, Bert C. van *The Concept of Representation in Parliamentary Democracy* Current Legal Issues, 96, p.36 and ff.

¹⁷ Nagel, Thomas *Ruthlessness in Public Life* in: *Mortal Questions* Cambridge: Cambridge University Press, 1991, p.82

in another twenty innocent lives being saved¹⁸. It is not inconceivable to maintain that William's tragic hero should not do the killing even if that would cause the deaths of other innocent people (a worse state of affairs in which more innocent people end up dead) and, indeed, both Kantian and most Christian ethics would prefer such solution. But why would deontological requirements be relaxed in public contexts?

Nagel's thesis that consequentialism is more widespread in public decision-making stems from his belief that those deontological requirements are *agent-relative* (or, in Nagel's terms, 'subjective') moral values or reasons for action¹⁹. Agent-relative moral reasons for action, as opposed to agent-neutral reasons, are reasons which spring from *choices* or *features* which belong to the agent within a space of 'moral autonomy'²⁰. The difference between an agent-neutral (objective) and an agent-relative (subjective) reason resides in the fact that the latter, but not the former, contains in its predicate what Nagel calls a free-agent variable. An example provided by Christine Korsgaard's will be helpful here:

Thus, suppose we say, 'there is a reason for any agent to promote her own happiness.' This gives me a reason to promote my happiness and you a reason to promote yours, but it does not give you a reason to promote mine or me a reason to promote yours. On the other hand, suppose we say, 'There is a reason for any agent to promote any person's happiness.' This gives each of us a reason to promote not only her own happiness but the other's as well.²¹

Notice that to admit that there are values which are agent-relative does not imply any sort of

¹⁸ Bernard Williams's example runs as follows: "Jim finds himself in the central square of a small South American town. Tied up against the wall are a row of twenty Indians, most terrified, a few defiant, in front of them several armed men in uniform. A heavy man in a sweat-stained khaki shirt turns out to be the captain in charge and, after a good deal of questioning of Jim which establishes that he got there by accident while on a botanical expedition, explains that the Indians are a random group of the inhabitants who, after recent acts of protest against the government, are just about to be killed to remind other possible protestors of the advantages of not protesting. However, since Jim is an honoured visitor from another land, the captain is happy to offer him a guest's privilege of killing one of the Indians himself. If Jim accepts, then as a special mark of the occasion, the other Indians will be let off. Of course, if Jim refuses, then there is no special occasion, and Pedro here will do what he was about to do when Jim arrived, and kill them all." *Utilitarianism: for & against* Cambridge: Cambridge University Press, 1973, p.98

¹⁹ I shall use in what follows Christine Korsgaard's terminology instead of Nagel's. What Nagel calls 'subjective' values or reasons for action I shall refer to as 'agent relative' values or reasons for action; similarly 'objective' moral values will be called 'agent-neutral' values.

²⁰ The expression 'moral autonomy' may lead to confusion here. The free-agent variable could be someone's *choice* but it could also be related to other of the agent's personal features, such as her *taste*.

relativism. Agent-relative values are (or at least they could be) based on a universal moral rule which institutes a moral variable connected to each agent in a particular situation. Christine Korsgaard's just-quoted example displays precisely this feature. I believe that the distinction between agent relative reasons and non-universal reasons for action is the key to understanding the idea of a 'stricter impartiality'.

It is not at all unusual that legal and moral philosophers claim that there is a stricter requirement of impartiality in contexts of public decision-making. Indeed, such a claim is so common that often it is taken for granted as a premise for further arguments aiming at justifying or describing public institutional arrangements. MacCormick's argument that the practice of precedents can be justified by an appeal to the greater impartiality required by the existence of an "authoritative public decision-making" is just one example of this common assumption²². The same point has been made also about some specific kinds of public context, notably judicial decision-making. Hart once pointed out that:

At this point [i.e. the point of interpretation] judges may again make a choice which is neither arbitrary nor mechanical, and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity 'legislation'. These virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a reasoned basis for decision.²³

This stronger requirement of impartiality in public contexts is often (and correctly) understood to be related to ideas such as equal treatment and, consequently, to the veto on personal preference as a ground (or as a motive) for action in public contexts. But how can this be consistent with the thesis, held amongst others by Nagel himself²⁴, that all morality, regardless of being public or private, always requires impartiality (in the sense of universalizability)? If that is the case, the only way in which one can admit a 'stricter' requirement of impartiality is to propose a thesis in which one can be more or less impartial. But being 'less impartial' seems to imply that one is being partial. I shall defend in what follows that there is a way to

²¹ Korsgaard, Christine *The reasons we can share: an attack on the distinction between agent-relative and agent-neutral values in Creating the Kingdom of Ends* Cambridge: Cambridge University Press, 1996, p.276

²² MacCormick, Neil *Universal and Particular: the problem of precedent* Outprint, p. 1-2

²³ Hart, Herbert L. A. *The Concept of Law*. Oxford: Clarendon Press, 1994, p. 205

²⁴ Nagel, Thomas *The Foundations of Impartiality* in Seanor, Douglas and Fotion, N. *Hare and Critics: Essays on 'Moral Thinking'*, Oxford: Clarendon Press, 1988, p. 102

make sense of the idea of degrees of impartiality, but let me start to present my claim by reminding the reader what Nagel does not mean when he claims that morality always requires impartiality.

First, Nagel is not saying that *all* decision-making always requires impartiality. Not only does this not follow from the connection between impartiality and morals but in a given interpretation, Nagel's theory (that in this particular resembles the works of Bernard Williams and Scheffler) explicitly defends the existence of a personal domain alongside the moral domain which is not itself bound by requirements of impartiality in decision-making²⁵. Secondly, to say that moral reasons for action must be impartial is to say something about the scope of moral reasons rather than about their source. It may be that some moral reasons are partially conditioned by the preferences of the agent or even by her personal relationships. This would be so if individual agents were granted a space to exercise moral authority and indeed this is what Nagel calls 'subjective' values²⁶ (and which I've been calling agent-relative reasons). This understanding of morality, regardless of its merits, is compatible with the claim that all moral reasons should be impartial, for the requirement of impartiality would be satisfied if one grants the same moral authority to all parties.

My attempt to explain how there can be a stricter requirement of impartiality is related to the second remark above. I claim that there are at least two ways in which an agent can be said to be impartial, namely: (a) one is impartial if one acts on universal reasons and (b) one is impartial if one does not act on agent-relative reasons, even if they are also universal²⁷. The weaker impartiality which, Nagel claims, is constitutive of morality can be understood as a requirement that the agent act as in (a), while the stricter impartiality would also incorporate a

²⁵ For a comparison between absolute impartialist doctrines like Kantianism and Utilitarianism and those contemporary moral theories which postulate a domain of the personal as immune to moral considerations (and therefore, to the strict requirement of impartiality), see Blum, Lawrence "Iris Murdoch and the domain of Morals." in Blum, L. *Moral Perception and Particularity*, Cambridge/Ms: Cambridge University Press, 1994, p. 12 ff.

²⁶ This is not to say that agent-relative (subjective) and agent-neutral (objective) moral reasons have the same moral status. Nagel argues, for instance that only the latter, but not the former, generates an obligation on anyone else to help the agent bringing the valuable state of affairs about. See *The Possibility of Altruism* Princeton: Princeton University Press, 1978, p. 90. In a postscript to this book, Nagel said he changed his mind on the subject for he came to accept that each subjective (agent-relative) reason implies the existence of an objective reason. For a discussion of Nagel's distinction and its implications see Korsgaard, Christine *The reasons we can share: an attack on the distinction between agent-relative and agent-neutral values* cit., pp. 275-310.

²⁷ This second sort of impartiality again admits of degrees. It may be that in some contexts only particular kinds of agent-relative reasons are not available to the agent, but not others.

requirement that the agent act as in (b).

Focusing on a particular ambiguity of the term 'impartiality' may help to make my point. On the one hand, being partial could be taken to refer to the situation in which one attributes a given weight to a particular reason for action in a certain circumstance while refusing to attribute the same weight to the same reason in another substantially identical situation. In this interpretation 'impartiality' is similar to 'universalizability'. On the other hand, being partial could be taken to mean that one's interests, projects and desires are taken into account as good reasons for deciding in one way rather than another²⁸. Notice that one can be impartial in the first sense without being impartial in the second sense. This happens when an agent takes into account her own interests in deciding what to do in a particular circumstance while allowing that anyone else in a substantially identical situation should do the same. And, indeed, one may be justified in doing so if there are good agent-relative reasons supporting the action which yield distinct ends for different individuals²⁹. The extra requirement of impartiality in public contexts may be understood as a veto on agent-relative (or at least on some sorts of agent-relative) universal reasons as grounds for decision. One can then understand why Nagel thought that the increased importance of consequentialist considerations in public contexts is also related to the requirement of increased impartiality. The deontological limits on action which reduce the weight of consequentialist considerations are, according to Nagel, agent-relative reasons for action. If it is true that in public contexts the requirement of impartiality reduces the weight of deontological considerations, it follows that, in those contexts, the consequentialist reasons are not as limited as in private contexts.

To sum up: if one understands impartiality simply as universalizability, the idea of a stronger or weaker requirement of impartiality is nonsense; if, however, we interpret the claim that more impartiality is required in public contexts as a call for impartiality in the second sense, to wit, as a veto on agent- relative reasons for action, the idea of degrees of impartiality becomes perfectly intelligible.

Two issues still remain open. On the one hand, there is the question of whether or not public contexts do indeed demand the sort of impartiality that consists in not using agent-relative

²⁸ This veto extends beyond the decision-maker's personal projects to include also anyone's project when taken to be more important than anyone else's. The requirement of impartiality in the second sense is not only a veto on egoistic considerations, but on any kind of privilege (even justified privilege).

universal reasons as grounds for action. On the other hand, it is not yet clear why the requirement of impartiality so understood should have any bearing on the question I proposed to answer in this chapter, namely: whether or not public agents can be justified in not reasoning before acting. Let me start by trying to justify why I believe that public contexts effectively demand stricter impartiality. I shall do so by bringing together the description of the peculiarities of public contexts presented above and the proposed separation between agent-relative and agent-neutral reasons for action. From this combination, two strong reasons result that justify my claim, which I shall call, respectively, the argument of personal interests and the argument of likely impact.

The starting point of the argument of personal interest is the already mentioned fact that public decisions are to be granted more power only on the condition that the decisions help to further the purposes of the public institution in the context of which the action performed. This follows, on the one hand, from the trivial fact that the public institutions to which those public purposes are attached cannot (conceptually) have personal aims such as having pleasure because they are not persons. On the other hand, and more interestingly, the pursuit of the personal aims of those deciding on behalf of the public institution is not a good reason for decisions in public contexts. What Raz once wrote about judicial decisions, namely that they are “taken by bureaucratic institutions, by people not acting for themselves but fulfilling a role of trust”³⁰, is actually valid for any other sort of public decision. Public institutions would be considerably more difficult to justify if they had among their main purposes the pursuit of the personal aims of those who are exercising the institution’s roles of trust. From either of those reasons it is safe to conclude that no *personal* purposes could legitimately be used as a reason for a public decision and that is to say that at least one sort of agent-relative universal value does not apply to public contexts, namely, values which spring from *personal purposes*. It is not necessary for the purposes of my general argument to go any further, but the argument just presented might be used to ground the much more ambitious conclusion that *no agent-relative value* is justified to ground a public decision.

The argument of likely impact is independent of the argument of personal interest. It is grounded on the fact that, as I said before, public institutions’ decisions are backed by much

²⁹ Nagel, T. *The Possibility of Altruism*, cit., p. 90.

³⁰ Raz, J. *On The Autonomy of Legal Reasoning* in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, edited by J. Raz. Oxford: Clarendon Press, 1994, p.339.

more effective means for their implementation than those available to individuals deciding in their own name. This means that especially drastic and widespread consequences *are more likely to follow* from public decision-making than are likely to follow from private decision-making. The range of possible consequences is enlarged in at least two ways. On the one hand there are decisions which a public agent backed by state power may be able to impose on individuals with impunity which a private agent would not normally be able to impose. It is often the case that it would be easier for you to resist my decision that you should be arrested than to resist a similar decision issued by a judicial authority for the simple reason that the judicial decision is backed by much more raw power. More telling still is the fact that the public agent will not be punished for the arrest, while if I were to imprison you it would probably be the case that I would be punished. On the other hand, because the means at the public agent's disposal are so much more formidable than the means at the private agent's disposal, public decisions *could* generate much more widespread consequences, reaching many more persons than private decisions could reach. I claim that, even if the public institutions were to have interests (as it may appear to be the case when the figure of the king and the figure of the state are not entirely distinguishable), those interests would be in most cases plainly overwhelmed by both the increased difficulty of resisting a public decision and the sheer number of interests which could be potentially affected by the decision. The fact that potentially more widespread and graver consequences could ensue from public decisions is a reason which undermines the space of subjective moral authority which belongs to the individual in private contexts.

In order to illustrate both points let us assume that Peter Ackroyd's³¹ explanation for the belligerent behaviour displayed by Henry VIII at the beginning of his rule in England is valid. Ackroyd suggests that Henry VIII longed to be as great a king as Henry V and, since part of the latter's value could be attributed to his military skills and ensuing victories against France, the young King believed that in order to match Henry V's greatness war was needed (preferably against France). Even in the unsteady period which marks the beginning of modern history, it is arguable whether military skill or glory would make a better King than diplomacy and prudence. But, if we concede that Henry's understanding of what constitutes a great man is correct, his actions would still be morally unjustified. His was also the mistake of having put his own self-improvement before the lives and wealth of a considerable number of his

people. Furthermore, he did not seem to have had in mind the purposes of the institution he was supposed to serve (the English monarchy); instead, if we are to believe Ackroyd, he acted on the pursuit of glory for himself. In Ackroyd's interpretation, Henry VIII's personal interests in leading a successful life were taken by him to be weightier than all other considerations concerning making his subject's lives better.

Two *prima facie* objections to the argument of likely impact present themselves even before the argument is fully worked out. The first runs along the following lines: such an argument depends on the idea that some actions have more widespread consequences, but that violates a moral requirement that actions be judged good or bad regardless of their actual consequences. However, even if this Kantian moral proviso were valid, and it is not at all clear that it is, the argument presented above is not in breach of this requirement. Not all uses of consequences of action are ruled out by that proviso and, indeed, the consequences of an action are often incorporated in the its moral description. A 'murder' is an action of causing something to happen, namely, the victim's death. For Kant, the blame is irrespective of the victim actually dying, a fact that may or may not result from my action, but still my action will only be murderous in the light of the consequence I intend to cause. That is perhaps what Bernard Williams meant when he wrote that it would be difficult to make sense of a form of morality which is absolutely independent of the idea of consequences. The way consequences matter in the argument above is not as actual events but as a part of the description of an action. It says nothing about the actual consequences of any particular public action, but only about public actions being the kind of action that could have some sorts of consequences, namely, a) an action which can be forced with impunity on b) a significant number of people.

Along a similar Kantian line, it could be objected that even if consequences can be incorporated in moral concepts and that the potential use of force against individuals is a good reason to introduce safeguards in the decision-making process, the argument still depends on the wrong supposition that value can be added across the boundaries of individuals, that is, that the threat to one individual is less worrying than the same threat to more than one individual. Kantians often deny that value can be added across the boundaries of persons and indeed such a crude way to add value may lead to counterintuitive conclusions. Think about Christine Korsgaard's adaptation of an example given by Bernard Williams:

³¹ Ackroyd, Peter *The Life of Thomas More* London: BCA, 1998, p.153-4.

[I]magine a peculiar theory of value. According to this theory, value is always objective or agent neutral, and the only thing that has value is the keeping of promises. This theory will not tell us always to keep our promises, surprising as it may seem. First, assume that we can add values. Then there could be a case like this: by breaking your promise, you could cause five other people to keep theirs; while if you keep yours, they will break theirs. You produce more promise-keeping by breaking your promise than by keeping it, and so that is what the theory tells you to do.³²

There are two problems with such an objection. First, it only invalidates the point partially since the impunity which may ensue from public decision-making (as opposed to private decision-making) does not depend on such addition of value and it can by itself justify extra safeguards in public decision-making. Secondly, if adding values across the boundaries of people can generate counterintuitive conclusions, not adding value can also generate oddities. Kant's insistence that one should tell the truth to the murderer of one's friend about the friend's precise location is just one such example³³. The solution seems to be in a combinatory principle which gives us grounds to perform such additions of value, but I shall not discuss this combinatory principle in here, for it goes far beyond the scope of this thesis.

The second *prima facie* objection to the argument of likely impact is that the value of self-improvement and the value of increasing the probability of respecting peoples' interests are incommensurable values and, therefore, there is no way in which we can establish that one of them is prior to the other. I agree that systematic priority between moral values cannot be justified and an argument to that effect will be presented in the next chapter. However, the conclusion does not follow from the premise. From the fact that there is no *a priori* way to establish a priority of one value over the other, it does not follow that no priority between those values can ever be established in particular cases. If one's contribution to defeat Nazism would have a small impact on one's character, but would be decisive in defending the legitimate interests of thousands of people against racism and nazi totalitarianism, it would seem clear, at least to me, that the morally correct thing to do is to fight Nazism and pay the price of, let's say, increased insensibility. In fighting Nazism, I might have to kill people. I might have to inflict pain on them and witness the suffering that I brought to bear on them and doing those things might make me more callous and insensitive to human suffering (much in

³² Korsgaard, C. *The reasons we can share: an attack on the distinction between agent-relative and agent-neutral values*, cit., p.293.

³³ See Kant, Immanuel *On a Supposed Right to Lie from Philanthropy* in Gregor, Mary J. *Immanuel Kant: Practical Philosophy*, Cambridge: Cambridge University Press, 1996, p. 611-615.

the same way that some doctors often lose touch with the suffering of their patients). But not fighting Nazism would still be wrong. That does not imply that one should *always* prefer the value of moral self-improvement to the protection of others' legitimate interests. Sometimes the legitimate interests of others might be trivial and the improvement on one's character very significant, in which case it might be right to prefer one's own self-improvement.

To sum up: the requirement of impersonality in public contexts is effectively a veto on considerations of *personal gain* either as grounds or as motives for public action. This conclusion follows independently either from the fact that public actions are only justified as such if they aim at pursuing institutional purposes or from the fact that the threat to a significant number of legitimate interests of others is very likely to outweigh the agent's own legitimate interests, given the means for implementing the decision which are at the public agent's disposal. I submit that it follows from the stronger requirement of impartiality in public contexts that public decision-making has to conform to some extra requirements in relation to decision-making in private contexts if it is to be morally correct. Those requirements are, first, an obligation always to act for reasons and second, an obligation always to select rationally the reasons for action. In a nutshell, the argument is as follows: as we saw in the first chapter, the main reason why one might be justified not to reason when deciding what to do is a reason of moral self-improvement; reasons of self-improvement are agent-relative; agent-relative reasons, as we just saw, are, at least in principle, excluded from public decision-making; if all that is granted, it would follow that the reason identified in the first chapter as *the sort of reason* that could justify one not to reason does not apply to public contexts. Let me now explain this in more detail.

Let me start by briefly recalling the reasons why I argued in the first chapter that not performing any reasoning before acting might be sometimes not only permissible but also morally required, even under the assumption that reasoning brings more certainty in moral matters. Acting for reasons implies that some sorts of action which are necessary for a successful life would not be performed. I called those actions in chapter one 'particularity-dependent' actions. Those actions do not spring from reasoning, but from the excitement of dispositions of character possessed by the agent; they cannot, by definition, be performed as a result of reasoning processes. Now, if reasoning keeps you from leading a successful life, that is a good reason not always to act on reasons. Of course, as we saw in the first chapter, that does not mean that reasoning should never be performed, for the particular action's impact on

someone's character is only one moral reason among many and there is no reason to believe that it would never be outweighed by other applicable moral reasons. As we also saw in chapter one, the virtue that causes one to make the right choices as to whether or not to engage in reasoning is prudence. The question that needs to be answered is: how does all that talk of the moral value of performing particularity-dependent actions relate to the argument about public agency presented in this chapter? More specifically, how does it help us to reach any conclusions about whether or not there is an all-pervasive obligation on public agents always to act on reason?

If what was said above about the peculiarity of public agency is correct, the requirement of impersonality in public contexts is effectively a veto on considerations of *personal gain* as grounds or motives for public action. If we grant that reasons of moral self-improvement are considerations of precisely that sort, it follows that reasons of self-improvement cannot justify that a public agent does not reason a matter through (having been given the opportunity to do so). What is interesting about the arguments which justify that public decision-making be more impersonal than private decision-making is that those arguments ban not only those personal considerations grounded on base self-interest (like accumulating capital, or gaining sexual favours) but also those grounded on noble self-interest, like an interest in personal moral growth. In order to understand the need for reasoning in public contexts of decision-making it is important to perceive that the concealment of the "I", although not absolute, is not only a mechanism to prevent against the selfishness of tyrants, but a ban even on some sorts of noble intentions. In order to do what is correct in a public context, the public agent is required by impartiality not to decide on the grounds that a particular course of action is ultimately better for her to become a morally better person. Taking some sorts of decisions during a war may make me increasingly insensitive to human suffering and, because of that, make me a morally worse person, but very seldom would that be the decisive reason why a decision in a public context should be made. Similarly, taking some sorts of decisions might, as we saw in the first chapter, make my life less successful. Striving to become a better person by developing the right inclinations, holding the right prejudices, leading a successful life is central to private decision-making. On the other hand, public morality seems to be not so much about developing one's character as it is about treating others rightly. Because impartiality in the second sense is additionally required in public contexts, the main reason one might have to refrain from reasoning, namely, moral self-improvement, is often defeated in those contexts.

Let us consider now whether or not the arguments which justify the requirement of increased impersonality in public decision-making can be used to justify a specific way of increasing impersonality which consists in using reasons in order to decide what to do. The first argument presented above for the conclusion that there is an extra requirement of impersonality in public contexts (which I called the argument of personal interest) leads to the conclusion that public agents should not pursue their private interests when acting on behalf of the institution they represent, but, instead, should act according to the institution's own purposes. All considerations of personal gains are, therefore, excluded. Now if the main reason one can have not to act on reflection is a reason of self-improvement, as we saw in the first chapter, and, if the argument excludes all considerations of personal gain, it follows that the general reason one might have not to act on reasons is not applicable to contexts of public decision-making.

The applicability of the second general argument for increased impersonality in public contexts (which I called the argument of likely impact) to the obligation always to reason in public contexts is not so straightforward. According to that argument, the interest one might have in one's self-improvement would be normally outweighed by the numerous interests resulting from the larger social impact, which is typical of public decisions. However, in order to be able to ground an obligation to adopt reasoning as the decision-making method which is appropriate to public contexts, my second argument for the necessity of increased impersonality in public contexts depends more directly on the value of certainty in moral decision-making³⁴. The conclusion of my second argument would have to be rephrased in order to be applicable to the particular case of the value of reasoning in public decision-making: a reason of self-improvement would often be outweighed by an *increased probability* of respecting important legitimate interests of a significant number of people, which comes about when one acts on reasons instead of, say, inclinations. Increasing the probability of bringing about the outcomes of the required moral action is sometimes more important than granting the possibility of performing the moral action itself. Public decisions have precisely this sort of impact given the overwhelming force that backs them. If my interest on my own self-improvement were weighed against the very numerous interests of other orders it would often be the case that self-improvement would not prevail. If the obligation not to reason

³⁴ Some arguments against the thesis that reasoning increases certainty in moral matters, such as Hampshire's were dealt with in the last chapter and I shall not be returning to them again.

comes from a duty of self-improvement and, in the instant case, this duty is outweighed, the reason not to reason is defeated *a fortiori*.

It is relevant to notice that it follows, as a corollary of the latter point, that comprehensive practical reasoning is more likely to increase the probability of bringing about the outcomes of the required moral action than partial practical reasoning. This last point is disputed and we shall analyse in the three following chapters three powerful arguments put forward to deny that performing comprehensive practical reasoning is always more prudent than performing partial practical reasoning, namely, the liberal argument for restricting public agency to the right (as opposed to the good), the Razian argument for respecting legitimate authoritative rules, and the Habermesian version of the argument that legal reasoning brings about pure procedural value.

Nonetheless, the conclusion that in public contexts the wiser way to decide is to ground one's decision in comprehensive reasoning does not follow directly from the arguments presented so far. There is still an objection that might be raised against the attempt to justify an absolute separation between public and private reasons in actual processes of decision-making. Because the increased impartiality needed in public contexts is a *value* (i.e., a reason) among other values, one could imagine public contexts in which, although both my arguments apply, they would still be outweighed by other moral values, such as the value of self-improvement. That follows from the fact that no systematic priority can be established between moral reasons. A full argument against systematic priority in morals will be put forward in the next chapter, but let us now just assume that systematic priority cannot be justified. If this is true, impartiality might in some contexts be outweighed by the need for self-improvement. In those situations, it would not follow from the reasons I offered above that there is an additional reason to act on reasons because the context is public.

A further complexity is added to the problem of finding the right balance between the requirement of increased impartiality in public contexts and the requirement of improving one's own moral life when the problem concerns the morality of decision-making and not the morality of action *tout court*. The morality of decision-making concerns the moral imperatives that govern the method of decision-making that should be adopted by the agent in deciding what to do. In this and the previous chapter, I have been trying to show how moral considerations such as moral self-improvement and impartiality have a bearing on whether or not one should adopt the method of reasoning in particular circumstances. However, the most

efficient way to learn whether or not the special reasons I presented as connected to public contexts in general outweigh all other applicable reasons is to *reason* the matter through and that, as we already saw in the first chapter, defeats the practical nature of the question of whether or not I should start reasoning. In short: the best way to *learn* whether or not the morality of decision-making demands reasoning is to reason, but starting to reason defeats the very point of the question. What needs to be asked, then, is what reasons I would have to engage in such debate if it may destroy the very possibility of my doing what is required. An answer to that question would eventually explain why I should approach public moral reasoning differently from private moral reasoning

One way of justifying the obligation to reason comprehensively in public contexts would be to refuse to accept my premise that there is no systematic priority in morals and that, therefore, it is not inconceivable that the stricter requirement of impartiality in public contexts be systematically prior to one's moral self-improvement. However, as I mentioned above, I shall provide in the third chapter an argument that explains why systematic priority is not justifiable which is largely based on Charles Taylor's 'argument of importance'. If that argument is right, the strategy of assuming systematic priority is not open to me. Luckily, there is another way to explain why public agents should always engage in reasoning, even running the risk of destroying the possibility of becoming a morally better person or of leading a more successful life. There is, indeed, a particular assumption which, combined with some of the conclusions already presented, can explain such an obligation. The assumption needed is that the probability of being required not to reason in public contexts is minimal. Clearly this does not follow *logically* from the distinctions between public and private agency presented above. That one is *more likely* to have to reason in public contexts than in private ones is not evidence that one is *at all likely* to have to use reason in public contexts. That notwithstanding, the two arguments help to visualise how difficult it is even to imagine a situation in which at least one of the two arguments offered does not apply to a public decision. This assumption, in turn, entails that it would often be the case that an action performed in a public context would have a significant impact on many legitimate interests.

From our assumption, it would follow that adopting a policy of reasoning public matters through would offer little risk for someone's moral growth which would not be outweighed by the additional requirements of impartiality in public contexts. On the other hand, as we saw at the end of the first chapter, the risk of not bringing about the required results would be

increased by the fact that the agent does not reason the matter through. Furthermore, not achieving those required results is likely to have very harmful effects on a considerable number of people. If all this is granted, it seems reasonable to conclude that the best way to decide public matters is to act on reasons.

It is important to notice that this is not a conclusion about what is the required action. The required action may be the one which springs from inclination, but the correct way to decide, granted that I am correct in my assumptions, is to reason the matter through. That is so because it does not follow from the fact that there are overwhelming reasons *for an action* which require one particular sort of decision-making process (as we saw in the last chapter) that one has an overwhelming reason to use that method of decision-making, if only because the agent may not *be able* to decide in that way (as when one does not have the inclination which would bring about the morally required action). If there is such a difference between reasons for action and reasons for decisions (for which I shall provide a more detailed justification in chapter four), the reasons given for believing that the morally best decision-making strategy in public contexts is to reason before acting would not be incompatible with saying that, ultimately, one should have acted out of inclinations in the particular instance.

Let us take stock of the argument so far. Public contexts in general have a number of special features compared to private contexts. Two of those features justify an additional requirement of impartiality in public contexts, to wit: (a) public institutions are not justified to have amongst their aims the pursuit of personal (notably their representative's) interests; (b) public decisions are often backed by such power that their consequences are potentially more widespread and serious than private decisions. This additional requirement of impartiality consists not simply in acting on universal reasons (which, some would argue, is compulsory in any sort of moral decision-making process), but also in the prohibition of acting on agent-relative reasons. Reasons of moral self-improvement are clearly agent-relative and, as such, they are not suited to grounding public decisions. If it is correct to say that, under the assumption that reasoning brings about more certainty, the reason one might have not to reason before acting is the agent's own moral improvement, it is clear that those reasons do not apply to contexts of public decision-making. Moreover, even if those reasons were allowed into the decision-making process they would be likely to be outweighed by the number and gravity of legitimate self-interests that hang in the balance. The conclusion is valid only for those contexts which bear those features. To make it more general, an additional assumption

must be added according to which most public decisions do bear those characteristics, and the combination of this assumption with other assumptions and conclusions previously arrived at, justifies one to think that it is, in principle, right to reason in public contexts. *Prima facie* reasons are still not definitive, since they can be still proven to be wrong. However, the only way to prove a *prima facie* reasoning wrong is to engage in reasoning as to whether or not one should reason the matter through. If this is correct, it follows that reasoning is always required in public decision-making either to confirm that one should comply with a *prima facie* reason or to try to defeat it .

The two main arguments presented in this chapter are different in many ways, one of which is particularly interesting, namely, the first argument (summarised above under ‘a’) is an argument which aims at proving that there are reasons *for acting* in a given way, while the second argument (under ‘b’) aims at providing reasons *for taking a given decision*, even if the action is not ultimately the required one. We shall argue in chapter four that under conditions of limited knowledge that is a morally relevant distinction and it is strictly connected with the assessment of moral blame and the giving of excuses. At this point, even before introducing the distinction properly, it is important to notice that one might have moral reasons to *decide* to perform an action which is not the action required by moral reasons that apply to it from an objective point of view. If this is the case, it might happen that even if the right thing to do in a particular circumstance is to follow one’s inclinations, and even if reasoning would completely destroy the possibility of following those inclinations, there might still be a reason for the agent to decide to reason a matter through. Under conditions of limited knowledge, such prudential reasons might lead an agent to make moral mistakes (or at least not to perform the best possible moral action) and still be the most rational moral thing to do.

This means that my second argument is an argument for holding a particular *prejudice*, namely, the prejudice that, in public contexts, one must always reason before acting. In presenting such an argument, I am engaging in the project of reinstating prejudices as having a legitimate role in decision-making, which is, of course, inspired by Gadamer. However, my defence of using prejudices in decision-making processes is both stronger and less general than Gadamer’s. Gadamer’s argument has two tenets. On the one hand, he argues that prejudices

(*Vorurteil*)³⁵ are constitutive of understanding. That means that an account of understanding that does not recognise a role for prejudices is simply wrong. The enlightenment project of ridding human understanding of all prejudice would then be fundamentally misguided. Indeed the project would itself be prey to a particular prejudice, namely the 'prejudice against prejudice' (and also against the related concepts of authority and tradition)³⁶. On the other hand, it is not true that prejudices *are all that is needed* for correct understanding to be achieved (notably in human sciences). Prejudices are departing points for arguments that might conclude at the end of the day either that the prejudice is justified or that the prejudice is not justified. Although prejudices, authority and tradition are an essential part of human understanding, they are not all there is to it. To think that prejudices, authority and tradition are the sole source of human understanding was the mistake of the romantic reaction to the epistemological project of the enlightenment³⁷. For that reason, Romanticism thinks that all rational critique of tradition is preposterous. Gadamer thinks that the attitudes of enlightenment (the systematic repudiation of all prejudices) and of romanticism (the worshipping of prejudices) are two related mistakes. Prejudice has a place in human understanding, but so does the rational reflection about prejudices. Hermeneutics is precisely the process through which 'good prejudice' is separated from 'bad prejudice'³⁸.

My own defence of prejudice is clearly less general than Gadamer's. I don't intend to prove that all understanding of human-related objects depends necessarily on the holding of prejudices, but only that it is correct to hold a particular prejudice, namely, the prejudice that one should always decide on reasons, in a particular context, namely, public decision-making. On the other hand, my defence of the thesis that public agents should hold a prejudice when acting in the exercise of their functions is stronger than Gadamer's attempt to reinstate prejudice as an essential part of human understanding. Acting on the prejudice I recommend public agents should hold precludes for the instant case the very decision on whether or not the agent should decide on reasons. The decision to act on inclinations is put beyond the reach of the public agent, who cannot allow himself (at least when exercising public power) to be the

³⁵ Gadamer, Hans-Georg *Truth and Method* 2nd ed., London: Sheed & Ward, 1989, p. 265 ff. An explanation for the pejorative use of the word 'prejudice' is to be found in p. 270, where Gadamer's detaches introduces the idea of a 'legitimate prejudice' as one of the central categories of practical reasoning.

³⁶ Gadamer, Hans-Georg *Truth and Method*, cit., p. 272.

³⁷ Gadamer, Hans-Georg *Truth and Method*, cit., p. 273 ff.

³⁸ Gadamer, Hans-Georg *Truth and Method*, cit., p. 277 ff.

kind of agent that lets himself be affected by certain facts.

That means that my second argument, by justifying the prejudice that one should reason in public contexts, implies an inherent limitation in rationality. What is required of a rational decision-maker may be not to perform the morally best action. If I am correct, all dreams of moral perfection in public settings through strict attachment to rationality would be shattered. For many, including Kant and utilitarians, the idea of a moral tragedy can only be conceived as a conflict between one's moral duty and some another aspects of one's life as, for instance, the agent's personal life, so that fulfilling the moral requirement would imply a loss in some other aspect of the agent's life. Public agents would be as vulnerable to this sort of tragedy as any other moral agent, perhaps even more vulnerable. Alternatively, a moral tragedy might be conceived as a situation in which the tragic hero is faced with an unsolvable moral dilemma. Public agents might also be faced with those sorts of tragic circumstances. But, if my arguments in chapters one and two are correct, there is yet another way in which to conceive of moral tragedy: moral tragedies might be conceived as situations in which even doing what is required might imply a moral loss. Public agents inhabit the realm of this tragedy. Although reasoning is the morally required thing to do, public agents, by reasoning, might be missing the opportunity of leading better lives. There is moral loss even if they are doing what is morally correct. In those tragic circumstances, all rationality can offer to public agents is good excuses for their soiled hands.

Conclusion

Let me now briefly explain how the argument just presented fits into the context of this thesis. In the first chapter, we saw that there is one kind of argument that, if valid, could justify that moral agents don't reason before acting, even if we assume that reasoning increases the probability of learning the right thing to do, to wit: arguments that centre on the idea of moral self-improvement. In the present chapter we saw that that sort of argument cannot justify that public agents don't reason before acting. But nothing so far was said about what is the *right way* to reason for public agents. If it is true that public agents are morally obliged to decide on the conclusions reached through rational deliberation, it follows that it is crucial for a moral theory of public decision-making that it incorporates answers to questions concerning the way in which public agents should select the reasons that are applicable to the case and the way in which those reasons should be matched against one another. Among problems concerning the morally best method of public reasoning, one is central: should public agents weigh all reasons

that are applicable to the case against one another or, alternatively, are they obliged not to consider some moral reasons that are applicable to the case. In other words, should public agents reason comprehensively, or should they decide only based on a restricted set of reasons. There are three influential arguments which deny that public agents should always balance all applicable reasons in deciding what to do. I shall dedicate the next three chapters to the analysis of three of those arguments. The next chapter deals with the liberal argument that reasons of the right are systematically prior to reasons of the good. Chapter four engages with Raz's argument to justify the thesis that legitimate authority produces pre-emptive reasons. Finally, in chapter five, I turn my attention to Habermas's conception of legal reasoning as producing pure procedural value.

I shall argue that all those arguments have a common feature. In order to justify the exclusion of some moral reasons from the set of reasons available to the public decision-maker, they have to defend the systematic priority of one moral value (which moral value would vary in each of the three arguments) over any other moral value. In order to justify that priority, all three arguments resort to the same strategy, namely, the strategy of grounding the systematic priority between moral values in arguments (and values) that are not specifically moral (e.g. epistemological arguments concerning the value of objectivity). I shall also argue that, in similar ways, each of the three general arguments fails either because they are not able to justify systematic priority or because, when they succeed in justifying systematic priority between values, they become trivial and unhelpful as a guide to decision-making.

Excursus on the Merciful actions performed in the exercise of public roles

Before I move on to deal with the problem of how comprehensive public reasoning should be, let me briefly make a connection between the argument about mercy in chapter one and the argument of chapter two, so as not to leave any loose ends before we start dealing with what I identified in the introduction as the second kind of alienation between public agents and their decision-making.

If my argument in chapter two is correct, it follows that public agents would not be justified in showing mercy, at least on the conception of mercy put forward in the first chapter. Most western legal systems include amongst the powers of the head of the state a prerogative similar to what in England and Scotland is called the royal prerogative of mercy. In Scotland, for instance, the royal prerogative of mercy is employed by the Queen on the advice of the Secretary of State for Scotland. The question arises then as to whether the exercise of the

prerogative of mercy by heads of state is in any sense similar to the departure from reasons that is constitutive of a merciful action in my conception of it. Curiously, from a strictly legal point of view, it would seem that the public exercise of mercy is characterised precisely by the head of state being liberated from the obligation of using the appropriate reasons. Courts in Scotland and England have established that the judicial review of decisions on the exercise of the prerogative of mercy by the head of state cannot consider the substance of the decision. As Lord Emslie put it in *Leitch v. Secretary of State for Scotland*,

‘...it is in our opinion the law of Scotland, as it is also the law of England, that the court has no power to inquire into the manner in which an application for the exercise of the royal prerogative of mercy has been dealt with by the minister responsible for advising Her Majesty in such matters’³⁹.

There is, therefore, no judicial control on whether or not and how reasons were used to take the decision. From a judicial point of view, the reasons for and against the exercise of the prerogative of mercy *do not exist*. But legal reasons are not the only reasons on which public agents decide and indeed the exercise of the prerogative of mercy by the head of state has often been conceived as a space for the use of strong non-legal reasons that apply to particular cases. Indeed the Secretary of State for Scotland usually makes explicit the non-legal reasons that led to the decision.

Those cases in which the public agent uses reasons as a guide to the decision as to whether or not she should use the prerogative of mercy are not particularly problematic. It only follows that, in spite of terminological coincidence, the ‘prerogative of mercy’ is not an instance of mercy, as defined in the first chapter. Recall that in the first chapter a merciful action was said to be an instance of particularity-dependent actions; particularity-dependent actions, in turn, were characterised in terms of the decision-making process from which the material action springs, that is, they were said to be actions that are not brought about as a result of reasoning but, rather, as a result of the excitement of dispositions. Whenever the Secretary of State for

³⁹ 1983 SLT 394, at p. 395-6. In England, after the House of Lords seemed to have settled the matter in favour of the thesis that the prerogative of mercy was not justiciable (*Council of Civil Service Unions v Minister for the Civil Service* (1985 AC 374, 1984 All ER 935, HL), the Divisional Court decided that judicial review of such decisions is possible, within limits (*R v Secretary of State for the Home Department, ex p Bentley* 1994 QB 349, 1993 4 All ER 442, DC). According to the Divisional Court, decisions concerning the prerogative of mercy are subject to judicial review when the Home Secretary wrongly assesses the limits of his own power. For an account of the development of case law in England. For a more thorough account of the development of case law concerning the judicial review of the exercise of royal prerogatives, see Munro, Colin R. *Studies in Constitutional Law* 2nd ed. London: Butterworths, 1999, p. 278 ff.

Scotland uses reasons in order to decide whether or not to exercise the prerogative of mercy, his actions will not be particularity-dependent.

However, in cases in which the decision as to whether to exercise the prerogative is not taken on reasons (but as a response to a feeling of pity or sympathy), the decision-making process is left open to the sort of criticism outlined in the second chapter, to wit: the recklessness of the public agent in exercising her powers without reasoning leaves her decision open to moral criticism. Her decision was not *prudent* enough and imprudence in public decision-making is a moral mistake. If I am correct, it might be worth including on the agenda for constitutional reform the question of whether or not some guarantees that those entitled to decide on the royal prerogative of mercy in the legal systems of England and Scotland should act on reasons. Kathleen Dean Moore outlines some proposals to change the law governing the presidential pardon in the United States, some of which are specifically aimed at compelling the public agent to exercise the prerogative based on reasons (e.g. the introduction of a legal obligation for the head of state to publicise the reasons for the exercise of the prerogative)⁴⁰. But I shall not enter the debate on the rules that should regulate the exercise of the prerogative of mercy, for my only concern in here is to point out that mercy is out of place in public agents' decision-making. As we saw above, even if, at the end of the day, the merciful action doesn't bring about any harm, the public agent might still be morally criticised for her recklessness in performing her public role. The grounds for this criticism would be that the principle of the morality of *decision-making* according to which public agents must always decide based on reasons (and for which I argued in this second chapter) was not respected.

⁴⁰ Moore, Kathleen Dean *Pardons: Justice, Mercy, and the Public Interest* Oxford: Oxford University Press, 1997, p. 211 ff., esp. p.220-1.

Chapter Three: Neutralist Public Liberalism and the Insulation of the Right from the Good

The first two chapters aimed at investigating whether or not there is any truth behind the fear that moral agents would stray from the right path were they not always to *act on reasons*. We saw in the first chapter that there are good reasons to believe that reasons are not always the best ‘motive’ for action. That an action is brought about as a result of stimulating an agent’s settled dispositions of character might be not only morally acceptable, but also morally required. However, as we saw in the second chapter, there are also good reasons to believe that public agents should always act on reasons instead of allowing their settled dispositions to guide their action. The conclusion to be drawn from the first two chapters is that, although reasoning is not always the best path to action, there are good reasons for *public agents* to internalise the prejudice that they should always act on reasons. As we have also seen in the second chapter, the reason why *reasoning* becomes so important to public decision-makers is the need for a greater amount of both impartiality and carefulness in public agency.

Some, however, believe that the fact that public agents act on reasons (as opposed to inclinations) is not enough to guarantee the necessary level of impartiality. Some liberals believe that, in order to guarantee that the necessary level of impartiality will be achieved, public agents must decide only on some sorts of legitimate practical reasons. From the total set of legitimate practical reasons, only a subset should be available to guide the public agent’s decision-making, namely, those reasons concerning the right. The liberal claim that public agents should only engage in a ‘restricted’ form of practical reasoning is the main target of this chapter. That claim is often presented as a thesis according to which public agents should not act on reasons that belong to conceptions of the good, instead they should decide on reasons that belong to a conception of the right. As the arguments go, reasons that stem from a conception of the good cannot guide public decision-making because they are not the *kind* of reason which is able to inform public decision-making and not because they were

outweighed by any reasons that belong to a conception of the right¹.

I start by showing how this thesis underlies the neutrality to which some sorts of liberals (whom I shall call hereinafter ‘neutralist liberals’) aspire. I shall then present the main difficulty one might have in upholding such a thesis, which I shall call the ‘argument of importance’. After that, I move on to rebut three arguments that aim at rescuing neutralist liberalism from this difficulty, namely, the ‘internal connection argument’, the ‘objectivity argument’, and a particular conception of the authority of reason. Let me start by determining what neutralist liberals mean by the priority of the right over the good.

Impartiality and Systematic priority

On one interpretation of the thesis of the priority of the right over the good, it follows from this priority that some reasons (reasons grounded on the good) are to be excluded from the set of reasons which could ground public decisions. On this interpretation, the thesis implies that, although reasons of the wrong kind could be considered in theoretical terms, they should have no weight whatsoever in contexts of public decision-making. To use Raz’s terminology they are overridden, not outweighed². This supposes that there are two ways in which a reason could be considered inappropriate to guide human action in a particular circumstance: either a reason is weaker than another reason (i.e. is defeated) or it is excluded from the very process of weighing up reasons. Indeed, Nagel identifies as central to two of the most influential contemporary neutralist liberal theories the idea that there is an order of reasons that does not apply to public contexts of decision-making. Of the liberalisms of Rawls and Scanlon he says that:

They [Rawls’ and Scanlon’s theories] distinguish between the values a person can appeal to in conducting his own life and those he can appeal to in

¹ I hope to have made clear in the introduction that the common purpose of the last three chapters of this thesis is to object to three rather different arguments that have at least one thing in common: they all try to justify that some sorts of moral reasons should be excluded by kind from the deliberative processes through which public agents decide what to do (although some of those arguments, like the one discussed in the fourth chapter, are directed more generally to any moral agent). Those arguments are the neutralist public liberal argument, Raz’s theory of legitimate authority (and its relation to legal reasons), and Habermas’s discourse theoretical conception of the interplay between legal and moral reasons (as presented in *Between Facts and Norms*).

² As in his Raz, Joseph *Practical Reason and Norms* 2nd ed. Princeton/NJ: Princeton University Press, 1990.p. 39 ff.

justifying the exercise of political power.³

In different passages of his *Political Liberalism*, Rawls does indeed seem to be making just such claim. For him, the priority of right “means that the principles of political justice impose limits on permissible ways of life; and hence the claims citizens make to pursue ends that transgress those limits *have no weight*.”⁴(my italics). In other passages, Rawls shows some hesitation in recognising that such claims have no weight whatsoever, as when he says that what is a necessary condition for honouring public reason and the principle of legitimacy is just that “we give very great and *normally overriding weight* to the ideal it prescribes”⁵(my italics). Regardless of such apparent hesitations, I believe that neither Rawls nor any other neutralist liberal could conclude against the absolute insulation of the right from the good, given their commitment to the value of *impartiality amongst conceptions of the good*. If an aspect of a particular conception of the good breaks through the insulation and defeats the right, it would follow that that particular conception of the good was preferred to other conceptions of the good. If we agree that neutralist liberalism is defined by its impartiality among conceptions of the good, it would follow that the distinction between two orders of values (reasons), which Nagel perceived in both Rawls’s and Scanlon’s theories, is a *necessary feature* of neutralist liberalism.

This distinction between two orders of reasons (i.e. reasons for the right and reasons for the good) implies a conception of public decision-making that is centred around a particular idea of the division of labour between individuals and society. In this conception of the morally correct public decision-making method, society would determine which reasons a public agent can use in her own moral deliberation and which reasons should not be included in the process of weighing reasons. The individual is left with a restricted set of reasons and, by weighing those reasons against one another, she performs the part of the decision-making process that was assigned to her in the division of labour. The division of moral labour that follows from the neutralist liberal commitment to impartiality among conceptions of the good is what I object to primarily. For that reason, my objections are only aimed at those versions of

³ Nagel, Thomas *Moral Conflict and Political Legitimacy* 16, *Philosophy and Public Affairs* v.3 (summer of 1987), p.221.

⁴ Rawls, John *Political Liberalism* New York: Columbia University Press, 1993, p.174. The same is said in slightly different terms in p. 209.

⁵ Rawls, John *Political Liberalism*, cit., p. 241.

liberalism that imply that moral division of labour. That means that neither general liberalism nor the value of tolerance is the focus of my critique, but one version of liberalism which has implications to whether or not reasoning in public contexts should be always plenary⁶. Particularly, I am not arguing against liberal perfectionists such as Joseph Raz⁷, Vinit Haksar⁸ and George Sher⁹. From a liberal perfectionist standpoint, tolerance and the freedom to decide one's own way of life are very weighty, but not absolute values, and that is in stark contrast with the absolute priority that liberal neutralists have to assign to tolerance and freedom given their commitment to impartiality among conceptions of the good. Moral perfectionists admit that there might be reasons for the state to protect some ways of life over others in some particular circumstances, that is, they are *partial* to some conceptions of the good. It follows that reasons for the right are not absolutely prior to reasons for the good and that, therefore, there is no exclusion by kind between them. More generally, I am not arguing against any sort of liberalism that recognises the impossibility of assigning systematic priority to liberty or tolerance (i.e. to reasons for doing the right) against all other moral reasons for action, such as the version of liberalism put forward by Isaiah Berlin in *Two Concepts of Liberty*. In a paradigmatic passage he states that he does 'not wish to say that individual freedom is, even in the most liberal societies, the sole, or even the dominant, criterion of social action.'¹⁰ Finally, I am not directly arguing against Dworkin's particular version of liberalism (let me call it 'equal-treatment liberalism')¹¹. To equal-treatment liberals, neutrality is not a value systematically prior to all other values, but a value derived from the *substantive* value of equal treatment. Of course they might believe that equal-treatment is a value systematically prior to any other value, but they do not need to argue so. In any case, my arguments against neutralist public liberalism are only aimed against the liberal thesis that impartiality among conceptions of the good is a value systematically prior to all other values and, whatever equal treatment liberals believe the moral status of equal treatment is, it does not imply that impartiality is always superior to all other values (if only because equal treatment would be always prior to

⁶ I use 'plenary' in the sense of 'full', 'complete' or 'comprehensive', as explained in the introduction, footnote 2.

⁷ Raz, Joseph *The Morality of Freedom* Oxford: Clarendon Press, 1986, esp. pp. 110-124.

⁸ Haksar, Vinit *Equality, Liberty and Perfectionism* Oxford: Oxford University Press, 1977.

⁹ Sher, George *Liberal Neutrality* Cambridge: Cambridge University Press, 1997, *passim*.

¹⁰ Berlin, Isaiah *Two Concepts of Liberty* in *Four Essays on Liberty* Oxford: Oxford University Press, 1969, p. 169.

impartiality).

But the overriding commitment to the value of impartiality among conceptions of the good (and the particular conception of the division of labour between individuals and society in decision-making processes that follows from it) is not the only defining feature of the sort of liberalism I want to object to in this chapter. Besides its commitment to impartiality among conceptions of the good, the liberalism to which I am objecting claims that the moral imperative of impartiality among conceptions of the good bears only on individuals acting in their public capacities, but not on individuals running their private lives. This means that the moral division of labour in decision-making that would be implied by the imperative of impartiality among conceptions of the good is not required in private decision-making. The liberals I am arguing against do not believe that reasons derived from an agent's particular conception of the good should be precluded from that agent's deliberations on private matters. Reasons for the good would be acceptable (and perhaps necessary), but only in relation to one's private affairs; they would be, on the other hand, precluded from deliberation in the public domain. Let me call this sort of liberalism 'public'¹². Not all liberalisms (and indeed not all neutralist liberalisms) are 'public' in this sense. No 'public' liberalism can be derived, for example, from the foundations of Kant's critical project for practical philosophy (or at least that is what I try to prove in the last section of this chapter). To sum up: my target in this chapter is those versions of liberalism that can be said to be both 'neutralist' and 'public', in the senses explained above.

Having established which particular sort of liberalism (neutralist public liberalism) I am arguing against, let me start to present my objections by considering which sort of argument would be needed in order to justify an absolute separation between the right and the good. In doing so, I shall concentrate on the versions of neutralist public liberalism that are more explicit about the need for excluding certain reasons from public decision-making, notably

¹¹ For an explanation of the difference between Dworkin's liberalism and neutralist liberalism, see Dworkin, Ronald *Why Liberals Should Care about Equality A Matter of Principle* Cambridge: Harvard University Press, 1985, p. 205.

¹² I prefer the term 'public' to the perhaps more appropriate 'political' in order to avoid a misunderstanding. The phrase 'political liberalism' has been given a very distinctive meaning by John Rawls and what I mean by 'public liberalism' (that is, the peculiar liberal principles applicable to public agents' decision-making) is an aspect of John Rawls' more comprehensive 'political liberalism' (which refers also to the 'freestanding' nature of Rawls's liberalism).

those put forward by Nagel and Rawls. Towards the end of the section, I shall present what I consider to be the basic difficulty neutralist public liberals have to face in trying to make their point.

If neutralist public liberals are to justify the absolute insulation between considerations based on the right and considerations based on the good, it is necessary that they present an argument which justifies the *exclusion* of some reasons from the practical reasoning performed in public contexts. Reasons of that kind (i.e. reasons for or against using certain sorts of reasons in decision-making) were dubbed 'second-order reasons' by Joseph Raz. But second-order reasons are still moral reasons, if for no other reason than because they are very likely to have an impact on the action eventually performed. Arguments for or against applying those reasons to particular cases are still *moral arguments* and, as such, they are still vulnerable to other moral arguments.

The fact that the reasons a neutralist public liberal might give in order to exclude some reasons (i.e. reasons for the right) from the public agent's decision-making are as much moral reasons as any first-order moral reason exposes the fundamental difficulty of providing a good second-order reason. That difficulty resides in the fact that the second-order reason has the burden of performing not one but *two* tasks: a) it has to insulate reasons that are appropriate to guide action from reasons that are not appropriate to guide action (that is, it has to explain why reasons for the good are not morally acceptable in public decision-making) and b) it has to insulate itself from the reasons that are not appropriate to guide action, for otherwise the reasons that it purports to exclude could still outweigh it. Another way to put the same point is to say that the second-order reason has to provide an answer to the following challenge: why can't an urgent inappropriate consideration, in one particular instance, outweigh the generally valid second-order reason. Otherwise, it may happen that, in a particular case, a particular second-order reason will be outweighed by one of the reasons it considers inappropriate to decide the case, in which case there will always be the need to consider the weight of the first-order reason not against the other first-order reasons but against the second-order reason which purports to exclude it from the list of reasons that are morally adequate to decide on a particular case. It follows that if neutralist public liberalism is to ground any form of non-comprehensive practical reasoning, the first-order reasons have to be excluded by kind also from the second (higher) level of deliberation. One strategy for providing a double insulation,

which is substantially different from the one adopted by neutralist public liberals, is Joseph Raz's theory of legitimate authority and, more specifically, his 'normal justification thesis'. Since I shall be dealing with Raz's strategy in the next chapter, let us now focus on the sort of second-order reasons normally used by neutralist public liberalism in order to justify the exclusion of reasons for the good from the public agent's array of reasons.

Thomas Nagel¹³ recently spelled out the essential elements of a kind of neutralist public liberalism (which is grounded on a version of what I called objectivity argument) and, in doing so, he also presented what is, to my knowledge, the best case for it. Nagel's argument also has another virtue which makes it ideal to be used as the voice of neutralist public liberalism in the dialogue I want to set up in what follows: his rendering of the neutralist public liberal argument helps to clarify why neutralist public liberalism needs to be complemented either by an argument concerning objectivity or by a version of the 'internal connection' argument, or else, by a particular conception of the authority of moral reasons. Of course, his argument is not uncontroversial among neutralist public liberals and I shall indeed take up some of the controversial points in so far as they are helpful to present my main argument against the insulation of some reasons from processes of weighing reasons.

As we saw in chapter two, Nagel believes impartiality to be necessarily connected to morals. Although this requirement of impartiality can take various forms, "it generally involves treating or counting everyone equally in some respect"¹⁴. He also believes that the requirement of impartiality is stricter in public contexts, for some sorts of impartial reasons are excluded on the grounds that the decision-maker has an interest in them. A stricter requirement of impartiality for public contexts along the lines of the thesis defended in the last chapter (which I shall call hereinafter 'weak impartiality'), is not strict enough for liberals like Rawls, Scanlon and Nagel. They go further claiming that the requirement of impartiality in public contexts involves also not preferring any weakly impartial conception of the good to another

¹³ Nagel, Thomas Moral Conflict and Political Legitimacy, cit.

¹⁴ Nagel, Thomas Moral Conflict and Political Legitimacy, cit., p. 215

weakly impartial conception of the good¹⁵. This impartiality amongst conceptions of the good amounts to the obligation that public agents have of not imposing “arrangements, institutions, or requirements on other people on grounds that they could reasonably reject”¹⁶.

Now, that sort of claim presents two connected difficulties. First, it is not clear how anyone could reasonably reject the moral truth. If I know that a particular conception of the good is true, why should I not favour it? Peter Jones made this point in his article *Liberalism, Belief and Doubt*¹⁷ and he did so by showing that my interest in doing what I believe to be morally correct is conditioned by the truth of my belief in the correctness of the action. If I learned that my belief wasn't true, I would have no reason for wanting to act according to the belief I now perceive not to be true. One doesn't need to go all the way with Jones, who concludes that the value of autonomy loses its weight in inverse proportion to the determination of determinability of the truth of the matter¹⁸, to see how it does not make sense that one believes an action to be morally wicked and still holds that one should be allowed to perform it. To illustrate the point, think of someone who is convinced that abortion is the murdering of a child. How could we make sense of someone who holds simultaneously that a) murdering children should be punished by public power and b) the state should not punish those who practice abortion?

Liberals often argue that the possibility of self-ruling is valuable in itself, independently of the correctness of the actual decision. If this line of argument is to be of any help, it must be accompanied by a justification for the fact that in at least some situations, self-rule (which I shall call hereinafter autonomy) is not morally justified. This justification could consist of a

¹⁵ Peter Jones has defended the existence of two sorts of liberalism, the first being about treating people's wants impartially and the other being about treating people's beliefs impartially. I shall not be dealing with the first sort of liberalism because it has no direct implications for the problem of whether or not some reasons for action should be excluded by kind from public decision-making. For a full statement of the distinction, see Jones, Peter *Liberalism, Belief and Doubt* in Bellamy, R. (ed.) *Liberalism and Recent Legal and Social Philosophy* Stuttgart: Franz Steiner Verlag Wiesbaden GMBH, 1989, p. 52-55.

¹⁶ Nagel, Thomas *Moral Conflict and Political Legitimacy*, cit., p. 221.

¹⁷ Jones, Peter *Liberalism, Belief and Doubt*, cit.

¹⁸ op. cit., p. 67

principle of equal respect for everyone's right to autonomy¹⁹, but there are moral problems which cannot be solved by that principle alone, such as who counts as 'someone' for the principle (is the foetus a person? if not when does it start being a person?²⁰). Some sophisticated versions of liberalism offer yet another justification for the respect for autonomy which aims at being more comprehensive than the principle of equal respect and, in doing so, they also offer a different account of the limits of the right to autonomy. This justification comprehends, on the one hand, a theory of the reasonableness of moral beliefs which is not parasitic on their truth and, on the other hand, a justification for attributing extra moral weight to the respect for conceptions of the good which are considered to be reasonable. The second part of the argument is normally made through a claim that the exercise of power over others demands extra carefulness. Notice that the latter argument attempts to provide an answer to the objection which is the crux of Jones' argument²¹: if my main interest is that moral actions be performed, how can it be right to allow people to do what is morally wrong?

That answer alone, however, is not able to ground the absolute priority of the right over the good and the consequent insulation from one another which would be implied in such an absolute priority. That is because, even if a theory of reasonableness which is not dependent on the notion of truth and an explanation of the moral value of respecting autonomy in leading a reasonable life can both be provided, it does not necessarily follow that, on the balance of reasons, one would never be authorised to act on another value. The failure is here largely due to ambition: in order to argue conclusively for the insulation of the right from the good one would have to provide a justification for impartiality amongst reasonable conceptions of the good in such a way that this impartiality would *necessarily* be able to defeat *any* other value which is part of any particular conception of the good. If that ambition is to be fulfilled, neutralist public liberalism would have to argue for either of three further theses. First,

¹⁹ A principle that could be easily derived from, say, Dworkin's account of liberalism, according to which the fundamental liberal principle is a principle of equality (see, for instance, Why Liberals Should Care about Equality in *A Matter of Principle* Cambridge: Harvard University Press, 1985, p. 205-6.

²⁰ Although Dworkin has provided a liberal argument that aims at justifying the right to abortion which was based on liberal principles. The most recent statements of that argument are to be found in the first part of *Freedom's Law* (Cambridge: Harvard University Press, 1996), specially its third chapter (What the Constitution Says) and in most of Dworkin's *Life's Dominion : An Argument About Abortion, Euthanasia, and Individual Freedom* New York: Vintage Books, 1994.

neutralist public liberals could argue for the existence of an internal connection between the value of autonomy and all other moral values; secondly, neutralist public liberals could argue for a deeper connection between morality and objectivity; thirdly, neutralist public liberals could argue that certain reasons, produced in a particular way, are more authoritative than other sorts of reasons (which are themselves applicable to the instant case). In order to understand the difficulties presented by this task, and the consequent need for further argument with which the liberal neutralist is faced, it is necessary to understand which *kind* of strategy can and which cannot be adopted by neutralist public liberalism in order to justify the absolute priority of the right over the good.

The two Strategies to justify the absolute priority of the right over the good

The justification for the absolute priority of the right can take either of two forms. It may take the form of an argument proving the plain *moral* priority of the values of impartiality amongst conceptions of the good and respect for autonomy in relation to any other moral values in all particular cases (that is to say that such impartiality would always defeat other moral values). Alternatively, it may take the form of an argument to the effect that impartiality amongst conceptions of the good is a moral value of a *different kind*, whose minimum respect requires priority over any other conflicting value.

The first alternative has the burden of implausibility. George Sher pointed out recently that:

“Perhaps the most obvious problem is that even if autonomy has great value, it hardly follows (and is most certainly false) that autonomy is the *only* thing with value.”... “Yet if autonomy is *not* the only thing with value – if it is only one good thing among others – then exactly how can its value justify neutralism? Even if promoting other values invariably undermines autonomy, why must governments always resolve the dilemma in autonomy’s favour”²²

²³

²¹ Obviously Jones is not the only to make this sort of objection. Many liberal perfectionists, like Jones himself, as well as most communitarians, would make that sort of objection to neutralist liberals.

²² Sher, *George Liberal Neutrality*, cit., p. 57.

²³ I will take for granted in what follows, without arguing for it, that there are other values besides autonomy, a view which I take to be hardly controversial. Sher does offer one such argument (*ibidem*), based on his conception of what autonomy is. Since I do not subscribe to his conception of autonomy (as exposed in pp. 45-55 of his book), I cannot subscribe but to the conclusion of his admittedly ingenious argument.

Although I agree with Sher's conclusion, the question that needs be answered is why governments would not (and should not) give autonomy systematic moral priority²⁴. The problem lies in the very notion of systematic moral priority. Charles Taylor made this point in a recent article and it will be helpful to remind ourselves of the main tenets of his argument. By systematic priority, Taylor means

“one that says, Answer all the demands that belong to domain A (say justice, or benevolence) before you move to satisfy any demand of domain B (say, personal fulfilment).”²⁵

This is precisely what the first strategy for justifying the priority of the right over the good consists in: before any value belonging to a particular conception of the good informs your action, the requirements of impartiality amongst conceptions of the good must be satisfied. The argument against this oversimplified version of a liberal justification for the priority of the right over the good is an argument about the moral relevance of features which are peculiar to the particular case. In some cases, the disrespect for one value can be minimal, while the gains in terms of another value can be immense. It is not true that all actions which could count in particular contexts as part of one domain, say the domain of actions that respect impartiality amongst conceptions of the good, have always the same moral weight. Respect for the requirements of one particular moral value may be paramount in one case and not that important in another case and the result of the process of weighing up reasons for action (or the values applicable to the particular case) is partially dependent on this dimension of weight to be added to the respect for moral values. In a nutshell, the objection is that a whole dimension of moral experience, let me call it the *dimension of importance*, is explained away by the introduction of a maxim of absolute moral priority. Because this dimension cannot be taken into account when systematic priority enters the picture, judgements in particular contexts run the risk, not only of being wrong, but also of leading to pragmatic absurdity (to use Taylor's phrase). Taylor's argument comes in support of an objection raised by Benjamin Constant against Kant's conception of the duty to be truthful as an unconditional duty. Constant's argument is that

“The moral principle ‘it is a duty to tell the truth’ would, if taken

²⁴ What I call, following Charles Taylor, systematic moral priority is effectively the same as what Rawls calls lexical order in *A Theory of Justice*, cit., 42-44.

²⁵ Taylor, Charles *Leading a Life in*: Chang, Ruth (ed.) *Incommensurability, Incomparability and Practical Reason* Cambridge/MS: Harvard University Press, 1997, p. 176

unconditionally and singly, make any society impossible. We have proof of this in the very direct consequences drawn from this principle by a German philosopher, who goes so far as to maintain that it would be a crime to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house”²⁶

Constant does not object to the existence of the general duty to be truthful, but to the conception of such a duty as unconditional, and his argument against this way of conceiving the mentioned duty is that it would lead to a pragmatic absurdity (represented in his argument by the idea of the impossibility of social life). Kant’s reply is that, in lying,

“I bring about, as far as I can, that statements in general are not believed, and so too that all rights which are based on contracts come to nothing and lose their force; and this is a wrong inflicted upon humanity generally, inasmuch as it makes the source of right unusable.”²⁷

It is far beyond the limits of this thesis to discuss Kant’s philosophy in detail, but it is worth pointing out that Kant’s justification for the unconditionality of moral duties depends on some assumptions which are not at all obvious. First, and most problematic, amongst those assumptions is the one according to which the actual consequences of an action, predictable as they might be, must have no influence whatsoever on the determination of what should be done. Only by introducing this proviso can one make sense of the formula ‘to bring about, as far as I can, the state of affairs X’ in Kant’s formulation above. Were actual consequences not to be excluded, it would follow that, in those cases in which I have no reason to believe that my lying will have any influence whatsoever on the credibility of statements in general (because, perhaps, it would be impossible for the listener to find out that I am lying), the formula ‘to bring about, as far as I can’ would become empty. If someone’s action cannot possibly bring about the dreaded state of affairs in which, say, promising is not possible anymore (because nobody trusts anybody), there would be nothing for the agent to worry about. What I want to stress here hardly needs to be stressed: although Kant’s formula seems to refer to consequences, the function of the phrase ‘to bring about, as far as I can’ is precisely to exclude arguments about actual consequences from consideration. Yet, this formulation shows clearly the sort of problems one runs into when one tries to identify actions without reference to consequences. The matter was already dealt with in chapter II and I refer the

²⁶ Constant, Benjamin *On Political Reactions* Frankreich im Jahr 1797, n.1, p. 123, quoted from the English translation of Kant’s answer On a supposed right to lie from philanthropy in Gregor, M. and Wood, A. (eds.) *Practical Philosophy - The Cambridge edition of the works of Immanuel Kant*, Cambridge: Cambridge University Press, 1996, p. 605

reader to that (perhaps too brief) discussion.

To sum up the argument against the plain systematic priority of autonomy: autonomy cannot be systematically prior to all other moral values without failing to account for a whole dimension of moral life (the dimension of importance) and, ultimately, without leading to pragmatic absurdity. It follows that this cannot justify the exclusion by kind of values belonging to (and favouring) a conception of the good from the process of public moral decision-making

The neutralist public liberal is, therefore, found wanting; what is still lacking is an explanation for the absolute priority of the right over any other moral value (which will ground the priority of the right over the good). The three most promising attempts to produce such an explanation introduce the idea that the absolute priority of the right over the good protects a moral value of a special kind which cannot be defeated in particular circumstances if it is to be minimally respected. In order to justify why respect for this moral value is *all or nothing*, both of these arguments draw on insights of other parts of philosophy which are, respectively, philosophy of action, epistemology and the critique of rationality. The first of those arguments, which I have been referring to as the ‘internal connection argument’, relies on a specific reading of what counts as an action; the second, which I dubbed the ‘objectivity argument’, relies on a given account of the value of certainty in decision-making; the third, which is in many respects connected to the second, depends on a certain theory about the authority of reasons. I believe that none of these arguments is able to ground the neutralist public liberal claim that public agents’ deliberation has no room for legitimate reasons which are part of conceptions of the good.

The Internal Connection Argument

Versions of the internal connection argument can be attributed to liberals such as Mill²⁷ and Kymlicka. Sher summarises the essential features of this sort of argument:

²⁷ Kant, I. *On a supposed right to lie from philanthropy*, cit., p.612

²⁸ Susan Mendus believes that Mill and Locke believed that a “way of life is valuable only if chosen freely” Mendus, Susan *Tolerations and the Limits of Liberalism*, Hampshire: MacMillan, 1989, p.77. However, Mill seems at points to be making the much stronger point that choice is not only necessary but also sufficient to make a way of life worth living. [See *On Liberty* penguin, p.133, a quote that Mendus herself uses]. If the latter interpretation is correct, Mill’s conception of the worth of a way of life is much closer to the idea of autonomy’s absolute value, with which we dealt above.

“This is the suggestion that autonomy is *internally* connected to the other values that appear to call for trade-offs – that, in other words, the value of superior ways of life resides not merely in (say) their intrinsic nature, but rather in their being chosen *because* of that nature.”²⁹

If this were correct, it would follow that any interference in the choice of individuals in order to oblige them to do the right thing is self-defeating, for it destroys the very conditions under which it is possible to make a morally good choice. In extreme cases, it would not be appropriate even to say that an action was performed by the person whose choice was undermined. If my action was not freely chosen, it seems that it is not entirely *my* action and, even if it was the correct action to perform under the circumstances, it would not be incorporated into my moral estate. As the argument goes, reasons concerning the good should not justify public action simply because this would exclude the choices of those individuals subject to public institutions. In short: a way of life which is imposed on someone is always worthless because it does not spring from choice.

Notice that the argument attempts to ground neutralist public liberalism not so much on a moral reason but on a thesis about the theory of action in general, combined with a moral truism: the thesis that an action is always a result of choice and the truism that only proper actions (but not involuntary reactions, such as reflexes) can be morally relevant.

But the argument hides a *non-sequitor*. It may work as a reason *not always* to limit an agent’s possibility of freely deciding what to do, but it is hardly a reason *never* to do so. If an agent has all her choices taken from her, there would be no room for her to perform any action. In such cases a whole aspect of her being would have been stolen from her, to wit: her condition of being a moral agent. Destroying the possibility that someone performs any sort of action means to make it impossible for her to be an agent *tout court* and, as a result, a moral agent. That seem to be enough to justify an absolute moral priority to the value of preserving the possibility of choice, for that value would be a condition for morality itself. An oversimplified version of the argument would be: without choice there is no moral choice; without moral choice there is no possibility of morally qualifying actions, agents, etc., therefore a morality that allows for the elimination of choice is self-defeating.

However, that argument does not work. Form the premise that denying *all choice* to an agent on moral grounds is self-defeating it does not follow that every time I take away someone’s choice *in a particular case* I will be denying the whole of her moral self. The necessity that

²⁹ Sher, George *Liberal Neutrality*, cit., p.58.

moral reasons do not imply the elimination of anyone's moral self does not work for all particular cases in which choices are taken from people, since I might eliminate *one particular choice* from a moral agent without destroying her status as a moral agent. That does not mean that taking choices away from people would not be morally wrong, but only that preserving the possibility of moral choice in particular instances is a value among others and could easily be outweighed in particular circumstances, and not an overriding value whose disrespect implies self-defeat.

In order to ground an absolute priority of the right over the good, this argument would have to assume the further premise that creating the conditions under which people can perform moral actions is an action whose *moral value* is systematically prior to all other *moral values*. The argument turns out to be essentially a *moral* argument and not an argument that derives moral consequences from some features of action *tout court*. Philosophy of action alone cannot help justifying the insulation of reasons concerning the right from reasons concerning the good. Let us now ask whether such moral argument can be provided.

First of all, remember that although performing the morally correct action is the end of practical reasoning, attributing value is a way of deciding in which we compare desired states of affairs³⁰. That an autonomous decision is a necessary condition for some states of affairs to be morally good or better than others doesn't imply that free choice is always part of any desirable state of affairs. Sometimes the state of affairs that ensues from the agent having taken his own decision is so bad that it would have been better if he weren't allowed to have done so. Think of what often happens on surprise birthday parties. The background is normally one in which the birthday person does not believe that throwing a party would be any better than not doing so. That kind of thought is not rare in people who are not in a good mood. As it often goes, a close friend (close enough to assess the effects of a party on the birthday person's mood) disagrees and, on the understanding that a party would actually rescue her friend from her present gloomy mood, she decides not to respect her friend's declared wish. Of course, whether or not that was the right decision depends on whether or not her belief is true. But suppose that it is really true and the friend's mood really improves. Would the ensuing state of affairs not be preferable to the one in which the birthday person's

³⁰ On how the idea of comparing states of affairs might be said to be part of both deontologic moralities and consequentialist moralities, see Williams, Bernard and Smart, J. J. C *Utilitarianism for & Against*, Cambridge: Cambridge University Press, 1973, p. 85

wish was respected and she continued depressed?

If no further reason is provided, the fact that a state of affairs was brought about against the express and sincerely-stated will of someone does not necessarily render the action of bringing the state of affairs about morally incorrect, although it might do so. The desirability of the state of affairs has to be weighed against the value of autonomy and there is no reason to believe that the latter will always prevail. It follows that, even if disrespecting a decision would always be incorrect, the final moral assessment of the decision not to respect someone's autonomy would have to wait until the other values involved are brought into play and weighed against the value of autonomous choice. Sometimes autonomy would clearly prevail. If I compel someone who is not a patriot in the least to take part in patriotic demonstrations 'for her own good' it would seem that often, on the balance of reasons, autonomy would prevail, if for no other reason than because there seems to be little value in this non-willing participation in patriotic demonstrations.

To sum up: even if moral actions are internally connected to choice and even if we admit that it is important that people perform moral actions, it does not follow that reducing the number of choices that someone may be called to make has systematically prior negative value. There is no reason to believe that the value of allowing people to make a decision is always systematically prior to all other values. That does not mean that no argument would be able to justify the systematic priority of autonomy and, indeed, we shall deal in the next section with some other arguments that are said to justify just the same conclusion. It only means that *the internal connection argument* doesn't work, and that, as a result, a justification for the absolute priority of the right over the good still has to be provided in order to justify the exclusion by kind of reasons for the good from practical deliberation.

The Objectivity Argument

A second strategy takes the form of an argument which tries to tie the moral value of political action to the objectivity of moral beliefs. More specifically, the strategy is to prove that the priority of the right over the good in public contexts is derived from a moral value whose respect depends on the respect of a value of another kind, namely, the degree of objectivity of a belief as to the moral worth of an action. On this reading, liberalism is the doctrine that attributes moral value to certain actions in virtue of *the objectivity* of the moral beliefs which could be said to ground such actions. My main contention in what follows is that arguments of this sort, regardless of their usefulness in other respects, cannot justify the exclusion *by kind*

of some reasons from practical reasoning. Different versions of the objectivity argument fail for different reasons and often the reason why they fail to justify the insulation of one set of reasons from another is not the fact that they are not good reasons for *liberalism*, but the fact that they are not good reasons for *neutralist public liberalism*.

The crudest version of the objectivity argument is the attempt to ground the priority of the right over the good in moral skepticism. The argument from moral skepticism itself comes in different versions, the common element amongst them being a premise according to which, whatever else may be required to justify an action by the state favouring a particular conception of the good, the favoured conception has to be morally better than the alternative conceptions of the good. If this is indeed a necessary condition for the use of state power to be justified, it follows that, by providing evidence that there is no way clearly to establish the moral truth³¹, it would be impossible to justify the use of state force in order to favour a particular conception of the good by the political authorities. It is then clear how moral skepticism could be considered, in Ackerman's phrase, as one of the 'main highways' to the liberal state³². However, moral skepticism also presents problems for liberals, for it implies not only that state intervention, when it favours one conception of the good, cannot be said to be justified, but also that no action could be said to be either morally right or morally wrong. How can a moral skeptic criticise any state intervention whatsoever, be it oppressive or not, if it is not possible to say which way of life is best? If a liberal is to criticise some instances of state intervention, but to accept other instances of such intervention, she has to have set opinions on what it is right or wrong for the state to do. Indeed liberalism is a moral doctrine whose principles and conclusions are always moral statements which liberals *believe to be true*. If this is correct, the grounding of neutralist public liberalism (or any other moral doctrine) in skepticism is clearly self-defeating. Neutralist public liberals claim that certain instances of state intervention are morally wrong because they are justified by reasons

³¹ By 'skepticism' I simply mean the dogmatic doctrine according to which it is impossible to *know* the truth. I am not referring to the Pyrrhonic skepticism put forward by ancient skeptics such as Sextus Empiricus. There is a major difference between the two forms of skepticism. While the skepticism I am worried about is a *thesis* about the (im)possibility of knowing the truth, Pyrrhonic skepticism is simply a *method* that aims to bring about ataraxia. As a method that aims at bringing about the sort of peace of mind normally referred to in ancient greek as 'ataraxia', ancient skepticism resembles psychotherapy. About the difference between ancient and modern Skepticism see Burnyeat, M. F. Can the Skeptic live his Skepticism in *The Skeptical Tradition*, edited by M. Burnyeat, pp. 117-148. Berkeley: University of California Press, pp. 117-148.

³² Ackerman, Bruce A. *Social Justice in the Liberal State* New Haven: Yale University Press, 1980.

belonging to conceptions of the good, instead of being justified by reasons belonging to a conception of the right. But if they hold that those actions are morally wrong, they cannot consistently hold also that there is no way to know the moral truth. Making a claim that I know something is inconsistent with making the claim that there is no way in which anyone could know things of that sort. It might be thought that an objection to my argument against skepticism might be provided along the following lines: ‘Any political theory is entitled – indeed obliged – to claim truth for itself, and so to exempt itself from any skepticism it endorses.’³³ That is generally true, but when the skepticism in point is a general skepticism about the moral truth, it leads to inconsistency. Indeed the skeptical argument has little currency amongst contemporary liberals³⁴. As a matter of fact, liberals such as Dworkin and Rawls³⁵ went further and argued against the truth of moral skepticism or, at least, against the attempts to use moral skepticism in order to ground liberal principles. As Dworkin once put it:

‘Liberalism cannot be based on skepticism. Its constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right.’³⁶

Although moral skepticism is ultimately unhelpful in providing a liberal justification for the use and restraints of political power, there are other versions of the objectivity argument which do not rely on moral skepticism and which deserve a closer analysis. The first step of the non-skeptic versions of the objectivity argument postulates the idea that the level of certainty or of agreement about the truth of moral judgements is itself morally relevant. Rawls’s ‘burdens of judgement’ work in *Political Liberalism* as a reminder that there are difficulties inherent in judgement that can explain why clever and well-intentioned people can still reasonably disagree on moral matters. Moreover, a reasonable person would accept that those burdens have ‘consequences for the use of public reasons in directing the legitimate

³³ Dworkin, Ronald *Do we have a Right to Pornography? A Matter of Principle* Cambridge: Harvard University Press, 1985, p. 350.

³⁴ Susan Mendus made exactly the same point in her *Tolerations and the Limits of Liberalism*, p. 78.

³⁵ Rawls’s objection to skepticism stems from within his conception of political liberalism. It is not so much an objection to the grounding of liberalism in skepticism as it is a moral (political) objection to the adoption of skepticism as a basis for action in a political society. If skepticism were to be adopted by the members of a society, it would be impossible to reach any overlapping consensus among reasonable comprehensive doctrines and, consequently, it would be impossible for a society to be well-ordered. See *Political Liberalism*, cit., p. 62-3

³⁶ Dworkin, Ronald *Liberalism* in: *A Matter of Principle* Cambridge: Harvard University Press, 1985, p.203.

exercise of political power in a constitutional regime'.³⁷

Nagel makes the relation between neutralist public liberalism and moral uncertainty even more explicit and, for that reason, I shall concentrate on his presentation of the objectivity argument in what follows. According to Nagel, the public obligation of not favouring any of the particular reasonable conceptions of the good is grounded on the moral requirement that public action can only be performed if it is justifiable with reference to moral beliefs which pass a special test of objectivity. Notice that this strategy shifts the perspective from moral requirements of action to moral requirements of decision-making: it only tells us how to act through telling us *how we should decide* to act. If one takes Scanlon's understanding of principles as being able to "rule out some actions by ruling out the reasons on which they would be based"³⁸, Nagel's argument of objectivity would be a typical instance of an argument from principle.

There are two kinds of reasons for action which Nagel claims to be insufficient to ground political action, namely, simple *personal beliefs* and *beliefs shared by all*.³⁹ Beliefs that command full agreement are not so much bad candidates for grounding political action as they are inadequate, for the justification of the use of force is only necessary where there is some disagreement⁴⁰. Full agreement on a practical matter implies that there is no need to use force since the parties would behave according to the beliefs everyone agrees upon voluntarily. Rawls makes much the same point when he remarks that '[w]e turn to political philosophy when our shared political understandings, as Walzer might say, break down and equally when we are torn within ourselves'⁴¹.

The reason why personal beliefs are not enough to ground political action is that, even when the agent is absolutely convinced that her's is the correct conception of the good, she is also aware that she could be wrong (if for no other reason than because we are fallible beings)⁴². If this is the case, it is reasonable to require more than personal conviction in order to use state power to favour a given conception of the good. As we shall see in what follows, the actions which would follow from those political decisions based on personal belief would not be

³⁷ Rawls, John *Political Liberalism*, cit., p. 54.

³⁸ Scanlon, T. M. *What we owe to each other*, Cambridge/MS: Harvard University Press (Belknap Press), 1998, p.199.

³⁹ Nagel, Thomas, *Moral Conflict and Political Legitimacy*, cit., p.231.

⁴⁰ Nagel, Thomas, *Moral Conflict and Political Legitimacy*, cit., p. 231 ff.

⁴¹ Rawls, John *Political Liberalism*, cit., p. 44.

⁴² Nagel, Thomas, *Moral Conflict and Political Legitimacy*, cit., p. 229.

justified because, in the process of deciding, the political agent wrongs others by acting on a belief which is not objective enough. Hence the need for a third kind of belief which would be, on the one hand, useful to handle disagreement and, on the other hand, sufficiently objective to ground political decision-making and make public action justifiable. Nagel claims that what identifies those beliefs is the fact that they are explainable in terms of a “common ground of justification”:

This means that it must be possible to present to others the basis of your own beliefs, so that once you have done so, *they have what you have*, and can arrive at a judgement on the same basis. That is not possible if part of the source of our conviction is personal faith or revelation – because to report your faith or revelation to someone else is not to give him what you have, as you do when you show him your evidence or give him your arguments.⁴³

That there is objective common ground between conflicting beliefs doesn't mean that agreement can be easily reached or even that it can be reached at all in any particular moment. But the conditions for agreement depend on the proper use of the shared conceptual tools; where objective common ground is lacking, the matter cannot be agreed upon without the introduction of a new factor in at least some of the elements on which the parties ground their belief (as when one converts to a particular faith). Nagel claims that beliefs which could be traced back to the “common grounds of justification” are more objective than personal beliefs⁴⁴. The greater objectivity of those beliefs is what makes them suitable for grounding political action. Nagel offers no explicit explanation of why the possibility of referring to common grounds of justification makes a contested belief better suited to ground public decision-making than referring to sincere private beliefs, but it is not difficult to perceive in his presentation of the “common grounds of justification” echoes of the Kantian idea of public reason. I will present in what follows the reasons why I believe that the idea of public reason won't help Nagel to justify the insulation of the right from the good, but before exploring the connection between Nagel's ‘common grounds of justification’ and Kant's public reason, let me get an alternative explanation, which looks promising, out of the way.

One might say (although Nagel would not), that a decision based on beliefs which can be grounded on common grounds of justification makes it more likely that the public agent would decide correctly. If we can be more certain about the beliefs which are explainable in terms of

⁴³ Nagel, Thomas, Moral Conflict and Political Legitimacy, cit., p.232.

⁴⁴ Nagel, Thomas, Moral Conflict and Political Legitimacy, cit., p. 231 ff.

our common grounds of justification, it would make sense to say that those beliefs are better suited to ground political decisions and even more so given that, as we saw in the second chapter, the exercise of political power demands extra carefulness in decision-making. There are certain problems with this explanation: first, it only explains why a belief which can be referred back to the common grounds of justification should prevail against conflicting beliefs which cannot be referred back to those common grounds, but it does not explain why a belief in the good which is not in conflict with a belief in the right should not ground political decisions; notice that, in spite of that shortcoming, the argument would be enough to prove the absolute priority of the right over the good whenever they conflict. However, a second and more serious problem arises, which is the lack of an argument to explain why the reference to the common grounds of justification would increase the probability of a belief being correct. Common grounds of justification are as likely to ground massacres as personal moral beliefs (indeed both probabilities are worryingly high). An argument relying on the greater probability of holding the correct belief should be able to explain that probability, and I don't believe that, in this particular case, it is possible to provide such an argument. However, even if such an argument could be provided, a serious objection against that probabilistic account being able to ground the exclusion of certain sorts of reason from the very process of decision-making would still remain. I will present that objection in detail in the next chapter, which concerns another, more interesting, attempt to exclude reasons from practical decision-making based on an argument of likelihood, namely, Raz's theory of legitimate authority.

Let us now go back to the suggestion that there may be a connection between Nagel's common grounds of justification and the Kantian idea of public reason and try to understand how this connection could help us to justify Nagel's claim that beliefs grounded on the common grounds of justification are the only ones able to ground public decision-making. Recall that, when a belief refers back to shared grounds, there may be still disagreement on whether or not the belief is true, but there can be no disagreement as to what would make the belief true. Recall also what we took in the last chapter to be the most problematic features of political decision-making, namely, the fact that, those decisions are backed by overwhelming coercive force. If this is true, the use of this power is then open to an objection inspired by the formulation of humanity as ends of Kant's categorical imperative. In this formulation, the categorical imperative reads:

So act that you use humanity, whether on your own person or in the person of any other, always at the same time as an end, never merely as a means.⁴⁵

Accordingly, the use of force by the state could be objected to on the grounds that, whenever someone is coerced to do or refrain from doing something, this someone is denied full autonomy and, therefore, is treated only as a means to a further end (which may even be the subject's happiness). Nagel seems to think that, were the decision-maker to decide based only on those beliefs which could be grounded in a way the citizen recognises, the decision-maker would be taking the citizens more seriously and, therefore, demonstrating that the dimension of humanity (of human beings as ends in themselves) is being accounted for, even if only imperfectly.

Although slightly different from Nagel's, Rawls's argument for the connection between political legitimacy and public reason is also grounded on the categorical imperative's formulation of humanity as ends. For Rawls, the peculiarity of public reason that explains why it is a better ground for political action than private reason, is the fact that public reason is guided by the criterion of reciprocity:

The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as *free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position*.⁴⁶ (my italics)

Nagel and Rawls share the thesis that respect for the humanity in those against whom public power is exercised is the reason why public reason is better suited to grounding public action than private reason. They differ in that, for Nagel, respect for the humanity in those subject to public power is shown by the public agent when she grounds coercive action on a level of actual agreement, while for Rawls this respect is shown simply by taking into account what others would regard as reasonable, were they simply free and equal agents. While Nagel conditions public legitimacy to the actual sharing of some common moral grounds, Rawls conditions legitimacy to the *shareability* of some principles by persons considered simply as

⁴⁵ Kant, Immanuel The Groundwork of the Metaphysics of Morals in Gregor, Mary J. (ed) *Immanuel Kant: Practical Philosophy* Cambridge: Cambridge University Press, 1996, p. 80.

⁴⁶ Rawls, John The Idea of Public Reason Revisited in *The Law of the Peoples*, Cambridge/MA: Harvard University Press, 1999, p. 136-7. See also Rawls, John Justice as Reciprocity in: Freeman, Samuel (ed.) *Collected Papers*, Cambridge/MA: Harvard University Press, 1999, esp. pp. 208-214.

free and equal⁴⁷. I believe that neither of those uses of the idea of public reason, if they are understood as a calling for more respect in decision-making, is able to ground the insulation between reasons for the right and reasons for the good. Although I shall use Nagel's rendering of the argument as the target for my objections, I hope it will be clear how those objections also apply to Rawls's.

I believe that the Kantian reading of Nagel's argument is enough to justify why it is morally better to act on public reasons (reasons reducible to the common grounds of deliberation) than to act simply on one's private beliefs. There is, however, a problem with attempting to derive from this conclusion any sort of insulation between reasons concerning the right and reasons concerning the good. If the adoption of Nagel's view by a public agent could, on the one hand, be said to make the agent more aware of the humanity in those subject to the political decision, on the other hand, it would imply the disregard of another essential human feature, namely, human rationality. To say that, even if our different opinions refer to the same common grounds of justification, I still think that I am justified, not only in holding my opinion, but also in forcing you to abide by it, seems to require that I don't take your claim to be as capable of drawing inferences from a common basis of justification as I am seriously enough. The alternative would be to regard myself as incapable of drawing inferences on the matter (due to either my poor reasoning capacity or to the fact that evidence on the matter is just not available), in which case I would have a rather weak case for any coercive use of force. The argument requires that any public agent, if she were to have her decision which goes against a citizen's belief justified, be remarkably paternalistic regarding that citizen. Admittedly, the paternalism would be even more objectionable if public power were exercised based on a belief which cannot be referred back to a common ground of justification; it would be paternalism of another kind, which doesn't recognise in citizens the competence to decide what should ultimately count as morally required in leading their lives. Although this seems to be worse than paternalism in the use of reason, that does not make the latter less of a sort of paternalism (and, consequently, no less objectionable as an attitude of those holding political power). Also, and more importantly, accepting the premise that the obligation of treating people as ends in themselves is systematically prior to any other moral obligation would imply accepting that coercion would be objectionable in either case. The alternative seems

⁴⁷ I shall return to the idea of shareability when I examine whether or not Kant's critical project is enough of a reason to believe in the insulation of reasons for the right from reasons for the good.

implausible: one would have to accept as morally justified a weak form of paternalism according to which the political agent is forcing the citizen to do what he really wants to do, even in the face of the citizen's refusal to recognise his actual want. I take it that a similar point was recently made by Jeremy Waldron when he wrote that the fundamental political problem is how to justify the use of state force in situations of disagreement *tout court* (as opposed to how to justify this intervention in situations of disagreement between those moral beliefs that cannot be linked back to common grounds of justification)⁴⁸. If this is correct, it is either the case that the only political solution is anarchism or that respect for others as ends in themselves is one reason which could be outweighed by other moral reasons in particular instances.

In spite of those difficulties, let us now suppose that the restrictions on the use of political power proposed by Nagel do indeed provide a justification for political action. The claim that no other way to exercise power is legitimate has yet to confront the simple but important objection that Nagel's claim is grounded in a moral value (the value of treating people as ends in themselves) which could, in principle, be outweighed by the other values coming into play. This is, of course, the central problem, for a Kantian ethics seems not to be able to admit values which could conflict with one systematically prior value which is the categorical imperative itself. Although I believe that not to be the best interpretation of Kant⁴⁹, let us examine how the value of treating persons as ends in themselves (which is the 'humanity formulation' of the categorical imperative) could be granted absolute priority over any other moral consideration. We already saw the sorts of trouble that we run into if we are to assign systematic priority to any moral value, but it may still be that this is our only choice (and that, if Charles Taylor is right about the idea of systematic priority, ethics could lead to pragmatic absurdity). One strategy to try to avoid the problems that assigning systematic priority to the categorical imperative would bring about is to ground the categorical imperative on a consideration which is not itself moral. And one way of doing so is to derive the categorical imperative from some assumptions that are needed in order to ground *reason's authority*. Here the objectivity argument meets the last argument for the priority of the right over the

Then I shall say more about Rawls's conception of shareability and about how it compares to Kant's.

⁴⁸ Waldron, Jeremy *Law and Disagreement*, Oxford: Clarendon Press, 1999, chapter 7.

⁴⁹ The categorical imperative seems to be not only a moral principle, as it is often treated, but the 'supreme principle of reason'. See Onora O'neil's *Constructions of Reasons: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989).

good with which I wish to engage in this chapter, namely, the argument which grounds the that priority on a certain conception of rationality. I now turn to the question of whether or not it is possible to justify public liberal neutralism as an upshot of that conception of rationality, whose fundamentals are to be found in Kant's critical project.

Public Liberal Neutralism and the Critical Project

Kant's project of a critique of reason aims precisely at justifying the authority of reason. If the categorical imperative is a by-product of a vindication of reason's authority, as Kant believes it is, it would seem that the categorical imperative could be said to be systematically prior to other moral arguments. A complete analysis of Kant's critical project is neither possible here nor required for my argument to be made, but acquaintance with some of its elements will prove important for me to show how no insulation between the right and the good can be justified by reference to the critical project. Let me quickly introduce some of those elements⁵⁰.

First, the critical project starts off by trying to demonstrate the non-viability of a foundationalist conception of the authority of reason. From the diagnosis of foundationalism's insufficiency, the project moves on to explain how reason could have any authority if there are no sufficient metaphysical postulates on which to ground it. Kant's answer is a version of constructivism. Without metaphysical foundations, we are left only with our actual processes of reasoning and the possibility of reflexive examination of those processes and, because of that, reason's authority can only come from within reason. Now reflexive examination on our bad reasoning habits can hardly be carried out in isolation. In the practice of public reasoning, the agent can find a plurality of standpoints from which to judge his or her own reason, and the availability of those alternative standpoints is necessary if we are to rid ourselves of the old and bad reasoning habits we have. Because old reasoning habits die hard, public reason is a condition for the authority of reason.

If Kant's project is indeed the only way to ground reason and, through reason morality, it would follow that protecting the conditions for public reasoning would be necessary not only morally, but as a condition for morals. As Onora O'Neill once wrote, for Kant "[r]estrictions

⁵⁰ The presentation of Kant's more general project that follows relies heavily on Onora O'Neill's reading of such a project. A more complete and elegant exploration of Kant's critical project can be found in her own writings, notably the first 5 chapters of *Constructions of Reasons*, cit.

of the public use of reason not only will harm those who seek to reason publicly, but also will undermine the authority of reason itself.”⁵¹ If one looks for a foundation for morality in Kant’s project, that foundation would not be a statement from which moral statements could be ultimately derived, it would be a bunch of actions that secure that reasons for action can be freely put forward to public scrutiny. Here we find the first political implication of Kant’s critical project, for, if the foundation of all reason, be it theoretical or practical, is action and if humans experience a need for reason, the only way of guaranteeing that this need will be met is to protect the sort of actions on which reason is founded. One must do one’s best in order to secure the necessary conditions for public reason, one of which is the existence of real communication between reasoning individuals. Acts of communication, as opposed to acts of private thinking, require the use of media through which the reasoning can be communicated between individuals. The first political obligation of those holding public office would then be to guarantee that those media are available (hence Kant’s praise of Frederick the Great’s support for the freedom of the pen), and that requires toleration by the political authority of any sort of expressed opinion. Now, assuming that Kant’s critical project is our only possibility of vindicating reason, would that be a sufficient ground to justify the absolute priority of the right over the good? I believe not. First, because the only actions which could be justified to take priority are expressions of opinion. All other actions which are not expressions of reasoned opinion could be in principle repressed. And, indeed, Kant at times seems to believe that the suppression of at least some civil liberties would increase the level of public reasoning⁵². Secondly, because it is not clear why failing to increase the level of public reason a small bit should take precedence over the good as revealed by instances of public reasoning. If telling someone of an argument would cause the addressee enormous pain, that may be a good reason to forbid the issuer to perform the act of communication; and even if it would be considerably more difficult to justify a larger scale prohibition of performing communication, as the publication of a book, to provide that justification is, in principle, possible. The reader will recognise this argument as an instance of what I earlier presented as the “argument of importance”. Even from within the critical paradigm, only those actions which would either create public reason or make public reason impossible could justify that,

⁵¹ Oneill, Onora, *Constructions of Reasons*, cit., p.37

⁵² Especially Kant, Immanuel An Answer to the Question: What is Enlightenment in Gregor, Mary J. *Immanuel Kant: Practical Philosophy* (Translated by Gregor, Mary J.), Cambridge: Cambridge University Press, 1996, p. 21 (VIII, 41).

respectively, the protection and the prohibition of such an action is absolutely prior to any other value. And such actions are difficult to imagine in Kant's conception of public reason as gradually emerging from the realm of the private⁵³.

There is another way in which the critical project of vindicating reason seems to be able to ground Nagel's claim that the use of political power is legitimate if, and only if, it aims at favouring a moral belief which can be referred back to common grounds of justification. Here the idea of 'common grounds of justification' works as a bridge between the objectivity argument (which alone proved to be insufficient to ground the insulation of the right from the good) and the argument concerning the authority of reason. To make it explicit: the extra objectivity to be assigned to beliefs that could be referred back to the common grounds of justification is founded on the better rational credentials of the reasons that support those beliefs. In public reason, we find the stock of standpoints from which reason itself can be criticised. If we don't subject our private belief to public reason that means that it cannot pass the test of critical reflexivity and that is enough to create suspicion of the use of reason in the particular case. A belief that passes the test of public reason could be said then to be more objective on the grounds that, although its truth may still be contested, one sort of criticism is already discarded, namely, the criticism of its *standard of rationality*. In other words, there is one fewer objection that one can make to a belief that passes the test of public reason. If what Nagel means when he claims that the moral beliefs which pass the test of public reason have extra objectivity is simply that such beliefs are not vulnerable to objections that may still be made (successfully or not) to the moral beliefs that haven't yet passed the test of public reason, it seems plausible to say that the former are slightly better suited to ground public (as well as private) decision-making than the latter.

However, before rushing to any conclusions from the idea of agreement on standards of rationality as a necessity for the vindication of reason to the idea that political decisions can only be justified by some reasons but not by others, one must consider for what Kant's idea of a public reason was built. Kant's project is one of vindication of reason as such and, for that reason, he has to set the standards for what counts as a reason *tout court*. If a reasoning process does not pass the test of public reason (its ground is not agreed upon by free citizens), it is not a valid reason to ground any action, not only public coercive action. If this is correct, Kant's account of the necessity of a practice of public reason would offer no grounds for

⁵³ O'neill, Onora, *Constructions of Reasons*, cit., p. 32ff.

differentiating between good private moral reasons and good public moral reasons.

The use Kant makes of the idea of public reason seems to support this interpretation. The requirements of publicity he advanced seem to be more to do with the internal features of moral claims which would grant their shareability (to which it might be added the need that media for communication are available) than with any level of actual agreement on specific values⁵⁴. In order to pass the test of public reason, beliefs have to be sharable and, in order to be sharable, they only need to comply with very minimal requisites such as consistency. In this respect, Kant's 'public reason', as a part of his project of vindicating reason, is fundamentally different from Nagel's 'common grounds of justification', since the latter requires that beliefs are not only shareable, but actually shared. If this level of actual agreement does not obtain, according to Nagel, political actions would not be justifiable. If it is correct that, for Kant, 'public reason', insofar as it is required by the critical project, needs only to contain minimal requirements of shareability, Kant's project of vindicating reason does not help to justify the exclusion by kind of moral considerations about the good from public processes of decision-making.

As a final consideration about the neutralist liberal attempt to ground the priority of the right over the good on an objectivity argument, I would just like to point out that one major difficulty of the project is concealed by an insufficient specification of the level of agreement required to ground public action. At some level, the existence of agreement on the grounds of justification is analytical. At the highest level, and if akrasia is indeed self-defeating, agreement is granted in that we should do what is correct. At other levels, some values can command an overwhelming agreement: most of us would agree that no moral action should bring about injustice. It follows that different levels of specificity would command different levels of agreement. The fundamental problem which is yet to be answered by neutralist public liberals is which of these levels of agreement is to count as our common ground of justification. This is not a small detail in an otherwise helpful argument. Depending on the level of agreement needed to justify the use of force, the spectrum of actions available to the political authority can change drastically. A thesis specifying the level at which agreement is required has to be argued for. This argument must be a moral argument, grounded on moral values, in which case liberal neutralists would still have to explain the systematic priority of

⁵⁴ On Kant's conception of what might make a reason shareable, see O'Neill, Onora, *Constructions of Reasons*, cit., pp.24-7.

the moral value favoured if the absolute priority of the right over the good is to be justified. The most promising argument for justification in moral matters seems to me to be Kant's vindication of reason, and we've already seen that the vindication of reason is compatible with a large number of moral claims.

Final Words

If I am right in saying that Nagel's argument could be defeated in at least some circumstances, it follows that the argument is not strong enough to ground an absolute priority of the right over the good and the consequent exclusion of considerations of the good from practical reasoning. Although Nagel provided a good reason not to act on some sorts of reasons, those reasons still have to be weighed up against the reasons they purport to exclude. This conclusion, I believe, delivers a serious blow to neutralist public liberalism as it appears in Nagel's (and also in Rawls') arguments for liberalism, for the reasons to be impartial amongst conceptions of the good are themselves to be weighed against the conceptions of the good they expect to exclude. On the level of moral decision-making, impartiality amongst conceptions of the good turns out to be necessarily a competitor to other moral values.

However, whether or not there is a way around my objection, the conclusion need not be that toleration is defeated. If I am right, the only conclusion about toleration that follows is that toleration would have to deal with other values directly. This implies that in all instances (and I believe there will be many) in which toleration defeats another reason for action the value defeated is indeed untrue (or at least its application to the particular case would be illegitimate). Nagel believes that, in many instances, living politics by that principle would be politically suicidal⁵⁵. Even if this were correct (and I have reasons to believe it would not be so) and although I admit that considerations of political expediency can make a moral difference under some conditions, that can only justify my *pretending* that a defence of toleration in a particular case does not deny the truth of an intolerant value (or of its application to the case). My perception of what really happened does not need to be changed by such arguments. Nagel is aware of that, and I suppose he would like to argue that my account of toleration has another shortcoming, to wit: the reach of my conception of toleration is not enough⁵⁶. Nevertheless, I don't see how its reach could be extended, and I believe that

⁵⁵ Nagel, Thomas *Equality and Partiality*, Oxford: Oxford university Press, 1991, 157.

⁵⁶ Nagel, Thomas *Equality and Partiality*, *idem*.

the neutralist public liberal attempt, for the reasons presented above, does not succeed in providing such extension.

One last word before concluding the chapter. Nagel's task in the argument analysed in the section above is to provide a feasible account of the 'moral division of labour between individuals and society'. Now there is an ambiguity in the phrase and working out that ambiguity will help to understand the limits of my claim. The moral division of labour between individuals and society may refer to the fact that the moral reasons *for action* one has are partly determined by facts relating to society (e.g. agreement on some basic matters) and partly determined by facts relating to the individual (e.g. one's preferences and commitments). If this is what Nagel means by 'division of labour', nothing in my argument above implies any disagreement between us. But I suspect that, in Nagel's reading, the division of labour refers also to a process of selection of what counts as a good reason for deciding in one way rather than another. On this interpretation, society would determine which reasons an individual can use in his moral deliberation and which reasons should not even be part of the process of decision-making. The individual is left with a restricted set of reasons and, by weighing up those reasons against one another, she performs her part in the division of labour of the decision-making process. If this is what Nagel means by the 'moral division of labour between individuals and society', we do indeed disagree.

My arguments above were designed precisely to show that there can be no alienation between the moral agent and his or her own decision-making process. Also, I maintain that there is no contradiction in accepting a moral division of labour between individuals and society in setting up reasons for action while rejecting that there should be a similar division in processes of moral decision-making. This should be evident once the difference between *moral reasons for actions* and *reasons for moral decisions* is spelled out. However, I shall postpone the presentation of the distinction between the two sorts of reasons because it suits my argumentative strategy in the next chapter, when I take on yet another attempt to alienate the moral agent from her decision-making process, to wit, Raz's theory of legitimate authority.

But let me first take stock of this chapter's argument. I started by presenting a particular conception of neutralist public liberalism which included an explanation of why it has to incorporate the idea of an exclusion by kind of reasons concerning the good from public decision-making. I then moved on to explain the difficulty with such claim, namely: that there is a need to provide an insulation not only between reasons for the good and reasons for the

right, but also an insulation between reasons for the good and the second-order reasons that exclude them. The problem with providing such insulation is the fact that it is not possible to justify systematic priority between moral values, and I used Nagel's neutralist public liberal argument as an instance of neutralist public liberal arguments so that I could show in which sense the impossibility of justifying systematic priority presents a problem to neutralist public liberals. Two strategies have been used by neutralist public liberals to mend their argument, namely, the internal connection argument and the objectivity argument. The internal connection argument does not succeed in putting the argument right for the simple reason that it does not follow from the fact that (moral) action has (conceptually) to be freely chosen, that one has a moral obligation to always allow people to freely choose what to do. Demonstrating how the objectivity argument fails to mend the general neutralist public liberal argument took me longer.

In order to do so, I had first to show how the neutralist public liberal argument with respect to objectivity is much more complex than an argument from moral skepticism. The argument distinguishes different sorts of moral disagreement and claims that those different sorts of moral disagreement are morally relevant, more specifically, only one of those sorts of disagreement can be settled by means of using state power. Then I moved on to ask what reason could be given to justify such a claim. A reason of probability was readily discarded and I concentrated on a reason that is suggested by Nagel's use of the idea of a 'common ground of justification'. The idea seems to be related to Kant's and Rawls's conceptions of public reason, and I then moved on to investigate why the possibility of justifying state intervention through 'public reasons' would be a good reason to say that the state is, all things considered, justified to intervene. One reason why 'public reason' might be thought to be a better ground for political action is the fact that, by ultimately grounding political action on a moral belief that even those who are coerced share, public agents are showing more respect for the humanity in those subject to their power. Thus interpreted, the argument leaves the flank open to two objections: first, one might say that, whenever coercion is exercised, public agents have to assume a paternalistic position that goes against the ideal of treating the humanity of those subject to power as ends; secondly, even if the possibility of being grounded on shared beliefs adds moral value to public decisions, the reason why this value should be systematically prior to any other value remains to be explained. One way of explaining such priority would be to say that public reason is the only way to vindicate the authority of reason. But, even if that is the case, the argument would not help to make a distinction between

reasons for the right and reasons for the good, since what would be vindicated is reason as a whole and not one kind of reason. With the failure of the objectivity argument, the neutralist public liberal argument for the insulation of some sorts of reason from the process of public decision-making is still lacking justification.

Chapter Four: Legal and Non-Legal Reasons in the common ground of deliberation

‘This is the reason why I [broke thy Law].

My Zeus did not give it to me.’*

(From Hölderlin’s translation of Antigone)

After having shown in the last chapter why I believe that the exclusion of reasons by kind cannot be justified from the liberal neutralist standpoint, I turn in this chapter to the problem of whether or not legitimate authoritative rules exclude moral reasons from the public agent’s decision-making process. In other words, I shall be discussing the thesis according to which rules emanating from legitimate authorities are *formal reasons*. It has been said that one is not treating rules (or any other sort of authoritative decision, such as direct orders) as formal (authoritative) if one weighs the value of obeying the rule against the value of disobeying it¹. If an agent’s practical decision-making process involves considerations which could lead to disobeying a rule, this agent would not *by definition* be treating this rule as authoritative (although, some would add, one might still think theoretically about whether or not obeying the rule would be correct). That implies that authoritative rules, if their authority is justified (legitimate), would have priority over other considerations in processes of practical decision-making. Legitimate authority implies, therefore, non-comprehensive reasoning. In this chapter, I am more particularly interested in one specific justification for that thesis, namely, the justification originally sketched by Joseph Raz in *Practical Reasons and Norms*, and later fully developed in *The Morality of Freedom*². In the next chapter, I shall be dealing with yet another argument put forward in order to justify an insulation between legal and moral reasons, one that is based on Habermas’s conception of law’s legitimacy.

* My version from the Hölderlin’s German translation.

¹ As Atiyah has pointed out (Atiyah, P. S. *Form and Substance in Legal Reasoning* in MacCormick, Neil and Birks, P. *The Legal Mind* Oxford: Clarendon Press, 1986, p. 20-1), Raz’s conception of rules as exclusionary reasons hints precisely at that idea of formality. Rules properly understood are not rules of thumb (Raz, J. *Practical Reasons and Norms* 2nd ed. Princeton/NJ: Princeton University Press, 1990, *passim*) to be checked against the actual substantive reasons; they exclude those reasons altogether from consideration. References to the passages of Raz’s works in which he discusses exclusionary (later called ‘pre-emptive’) reasons will be provided in the second section of this chapter when I deal specifically with those sorts of reasons.

² Raz, Joseph *The Morality of Freedom* Oxford: Clarendon Press, 1986.

My argument in the present chapter aims at making the point that legal reasons are unable to exclude other reasons *by kind* from practical decision-making. I expect to achieve this aim by showing how Raz's justification for an exclusion by kind between legal and moral reasons does not work³. If different sorts of reason demand incompatible courses of action, public agents must weigh all those reasons against each other in their practical deliberation. In the last section of the present chapter, I shall briefly consider the problem of *how* those different kinds of reason should interact in decision-making. The first section of this chapter aims at situating the problem of the special status of politically-created reasons in practical deliberation, so that we can understand precisely what kind of reasons Raz's argument supposes authoritative reasons are. I start by analysing a number of different ways in which an agent might be said to be autonomous. That approach will help to establish the different senses in which authoritative orders might be said to interfere in a subject's *autonomy* and, in particular, the different ways in which they can intervene in the subject's *decision-making*. I shall then introduce a distinction between the reasons that make an action right and wrong (which I shall simply call 'reasons for action') and the reasons one should use in order to decide particular cases (which I shall call 'reasons to decide'). I believe that Raz's *normal justification thesis* applies not to the former, but to the latter sort of reason and the second section of the chapter is an attempt to establish whether or not Raz's argument is sufficient to justify an insulation between legal and moral reasons for deciding. In the concluding section, I intend to deal with other explanations for the formality (authority) of legal norms and show how they also fail to insulate legal from moral reasons. As a result of this discussion, a way of conceiving law's formality will be defended that is different from Raz's. I shall use Atiyah's well-known article on law's formality as a guideline for the closing discussion⁴.

Autonomy and Authority

A central task of political philosophy is to provide an account of the conditions under which the political community is entitled to intervene in its members' lives. This preoccupation is clearly present in modern liberal political theories, but even theories which were not concerned *primarily* with the entitlement the community has to intervene in the life of its members, such

³ Because legal rules are the paradigmatic instance of authoritative rules, I shall often be referring to them in what follows, but that does not mean that my arguments do not apply to other sorts of authoritative directives.

⁴ Atiyah, P. S. Form and Substance in Legal Reasoning cit.

as the traditional Marxist critique of capitalism, have relied on arguments of self-determination (as when the appropriation of surplus value is criticised as a violation of the labourer's right to self-ownership) in order to criticise the structure of social relations in general and the use of coercive force in order to protect the system in particular.⁵ There are very many ways through which a person's life can be affected by the intervention of a second person or group of persons and different sorts of intervention could be, in principle, justified in different ways. Moreover, those different forms of intervention and the different justifications for each of them could be connected with each other in a relatively complex scheme. If this assumption is correct, it would be worthwhile to start this chapter by identifying some rather common ways through which intervention in a person's life by another person or group of persons can occur.

Political philosophers have identified two general forms of intervention in people's lives that are often attempted by those holding political power. First, individuals can be coerced to do or to refrain from doing something. It is hardly controversial that most contemporary political communities *use* coercive power in highly organised and effective ways. The question political philosophy tries to answer is under which conditions, if at all, the use of force by the community in order to intervene in someone's life is justified. Secondly, quite apart from directly exerting force against its members, the community might also intervene in the very process of deliberation through which the person decides what is the best course of action. One way in which this intervention might come about is simply by means of threats of using force. When the authority issues a statement in which it declares that all those who do not perform a certain action (say, the action of paying a particular tax) will be imprisoned for a certain time, it is not exerting force directly, but simply attempting to intervene in the decision-making process of the subject by means of creating a reason to perform an action.

However, the intervention in an agent's process of decision-making also takes more subtle forms. Suppose that, after some thinking, I arrive at the conclusion that you should do something, for instance, that you should read my PhD thesis, and then I tell you of my conclusion. How can my saying that you should read my thesis change your previous situation regarding the range of options open to you as to whether or not to read this thesis? It could be that you take my decision to express a desire of mine, or a sample of the majority opinion, or

⁵ See G. A. Cohen *Self-ownership Freedom and Equality* Cambridge: Cambridge University Press,

another *fact* that you believe to be relevant for the decision you are about to make. In this situation, the communication of my conclusion about how you should behave would only have a bearing on your possibilities of decision if it gives some information about the world that is in *itself* a relevant piece of information. If we assume that you care about my well-being, informing you that I would be sad were you not to read my thesis would give you a good reason to read it. The decision could then be *interpreted* not as a command, but as a description of a given state of affairs (namely, that I would be sad should you refuse to read my thesis). In spite of the apparent similarity, this sort of intervention in the deliberative process is not the same sort of intervention that might be produced by the sort of authority that Raz called ‘recognitional’. In Raz’s depiction of the recognitional conception of authority:

“The authoritative utterances of practical authority are reasons to believe that one ought to do that which the utterance says one is to do”⁶

The interference in practical reasoning sketched above doesn’t provide you with any reason to believe that a given course of action is the correct one, but only with a reason to believe that a given situation obtains (a situation that you happen to find relevant to your decision). It gives you a reason to believe that a given fact is the case but not necessarily a reason to believe that the fact is a reason for action. This sort of interference can hardly be called ‘authoritative’. Indeed, a slightly modified version of Raz’s objection to the recognitional concept of authority applies here, namely, that such a conception leads to a view of authority in which “authority does not necessarily change people’s reasons for action”⁷. How effective this objection is against conceiving this sort of interference as ‘authoritative’ can only be fully appreciated once we spell out an ambiguity in the idea of a ‘reason for action’. The ambiguity will be dealt with below when I introduce a distinction between reasons for action in an absolute sense and reasons for action that feature in decision-making processes. However, more important than deciding whether or not that intervention can be conceived as ‘authoritative’ is to answer the problem of whether or not this sort of intervention in someone’s decision-making process is detrimental to the subject’s autonomy?

It would seem that it isn’t, for after my intervention (stating that you should read my thesis) you are still a fully autonomous decision-maker if only a bit better informed about the facts

1995, p.144 ff.

⁶ Raz, Joseph *The Morality of Freedom*, cit., p. 30

⁷ Raz, Joseph *The Morality of Freedom*, cit., p. 30

and possible factual consequences of your decision. I can still manipulate you by providing selective information or by telling lies that I think will bring you to decide in one way rather than another. Nevertheless there is no reason why my opinion should be taken into consideration *in its own right*. This is clear in two different situations: first, had you learned about the facts that you infer from my telling you that you should read my thesis *before* I told you to do so, your possibilities of decision wouldn't be changed by my supervening intervention; secondly, had you learned about those facts through completely different means (someone told you that I would be upset if you decided not to read the thesis), the outcome would be the same. Of course, there is a sense in which providing information changes the moral landscape of an individual. If, for instance, I know that my performing action x (buying a car) will have consequence y (someone will die), I cannot use my lack of knowledge as a moral *excuse* for my having performed x. Information might exclude one possible excuse from my moral estate, but there is a different way of interfering in someone's affairs which has a different sort of bearing on his practical reasoning and which is of particular interest for the understanding of political and specifically legal authority. Under some conditions, my statement that you should read my thesis may be relevant *in itself*, which means that the fact that I reached a given conclusion and that I told you about it may *itself* be a reason for you to decide to act according to my conclusion. This limits your autonomy in a way different from the way in which to be obliged to do or refrain from doing something by force does.

Moreover, whenever one agent creates a reason for a subject to decide in a particular way, nothing in principle guarantees that the reason created will or should prevail against all other reasons available to the subject in her decision-making process. Whether or not my conclusion that you should read this thesis is a relevant factor in your actual process of deliberation depends on you attributing some value to it (say, the value of pleasing a friend of yours). The decision itself is not self-enforcing in this sense and you are still autonomous in the important sense that you are not obliged to take my conclusion into consideration. That sort of interference (obliging someone to take account of one's statement about what should be done in her process of deliberation) could be achieved through many different methods of conditioning deliberative behaviour by force or by argument (but the possibility of failure is always present, as Sartre pointed out when he said that in prison his spirit was still free).

In order to understand the sort of interference in decision-making processes I will be referring to as 'authoritative' throughout this chapter, it is important to bear in mind that rational

decision-making processes always aim at *correctly* weighing up the reasons and, in doing so, at informing a *correct action*. If this is so, there is a sense in which your selection of reasons is not arbitrary. In the *Clouds*, Aristophanes mocks Socrates (and through Socrates the whole of practical philosophy) for he leaves the stage when the exchanges between Justice and Injustice are about to start⁸. According to Leo Strauss, this makes it appear as if Socrates wanted to have no influence on the exchanges so that he would not be responsible for the outcomes⁹. If one wanted to be fair to Socrates (which is probably not Aristophanes' wish), one could take his act of leaving the stage as meaning simply that what makes an action just or unjust or a process of deliberation correct or incorrect is not dependent on the *opinion* held by the decision-maker about what should count as a just action or a correct deliberation. This is not to deny that one can, under specific circumstances, change her moral landscape by including either reasons for *action* or for *deciding* to perform an action. One can do that, for instance, through a promise to do such and such. What is important is that the correctness of the choice of reasons to be balanced and the weighing of those reasons is not dependent on the decision-maker's *opinion* of what should be considered correct. The meaning of Socrates' lack of interest in the exchange between justice and injustice might be seen as an allegory of the fact that whatever the *correct* balance of reasons is, it is not dependent on the subject's opinion on what the right balance of reasons should be. Moreover, the reasons that come into play when a moral agent is weighing reasons against one another in order to decide what to do are not freely *chosen* by the agent. Socrates' presence is, then, of no consequence. In short: one might have some control over the reasons one *actually takes into account* in deciding what to do, but one has little or, sometimes, no control whatsoever over the reasons that *must be taken into account* in order to decide what to do.

Now suppose that, under some circumstances, someone's actions have the power to alter someone else's moral situation by including further reasons among the reasons which *morally should* be taken into consideration and weighed by the decision-maker. This situation is analogous to that of the subject changing his or her own moral situation by promising to do something. If those circumstances obtain, someone's action will cause the inclusion of one reason in the list of relevant reasons that should be taken into account by someone else. What

⁸ *The Clouds*, 887-8.

⁹ This is Strauss's interpretation of Socrates's exiting from the stage at precisely that moment. Strauss, Leo *Socrates and Aristophanes* Chicago: The University of Chicago Press, 1966, p. 28-9.

was changed as a result of the first agent's action was the *criterion for correctness* of the second agent's decision-making process and this has a particular sort of impact on the latter's autonomy. Through this sort of intervention, one is not only modifying actual decision-making processes by including or excluding reasons, but modifying the standard for what would be *the right* decision-making process in the particular circumstances. I shall call this sort of interference an interference in someone's *strong autonomy*, to differentiate it from the sort of interference in which the individual is simply made *to use* certain reasons in her deliberation, but which does not change the reasons that, from the moral point of view, have a bearing on the decision-making process.

This is the moment to deal with the ambiguity in the phrase 'reasons for action' which I mentioned earlier. On the one hand, 'reason for action' can be understood as a fact or set of facts whose occurrence in the world makes it correct to perform a given action¹⁰. An example might help me to conduct the discussion here. In the limited context of deciding how to invest your money and, given that the only relevant considerations are those related to the increase of capital over time, the fact that the government is soon to intervene in the market so as to devalue the national currency is a good reason for deciding to invest in foreign currency (for the sake of simplicity, let us assume that the world is such that there is no other factors at play here). If this is what is meant by saying that there is a 'reason for action', the only way I can intervene in the criteria according to which your decision-making is judged is by changing something in the world. In our example, if the government changes its mind and decides not to devalue the currency the reason for investing in foreign currency that you had before disappears and such investment, other things being equal, would be not as good an investment.

On the other hand, 'reason for action' might refer to a reason one takes, or should take, into account in a deliberative process. Let me call those reasons 'reasons for deciding to perform a given action' (or more briefly 'reasons for deciding') so as to reserve 'reasons for action' to the changes in the world mentioned in the last paragraph. The difference I am trying to draw attention to is often misunderstood as a result of taking it as a difference between reasons which exist objectively speaking and the possession of those reasons by the decision-maker (and, in this sense, the distinction would perhaps be part of a theory of error in decision-making). If this were correct, it would seem to follow that all the reasons one *should* take into

account in decision-making processes would be the objective reasons for actions that exist in the world. The difference between reasons for action and reasons for deciding would simply be that the latter, but not the former, are used by a particular decision-maker. That means that if the decision-making process is to be considered correct, all reasons for deciding would be objective reasons for action which already existed in the world before being 'embodied' into the particular decision-making process. I believe this conception of reasons for deciding to be insufficient. In decision-making processes carried out under imperfect conditions, notably conditions of limited knowledge or limited time to decide, there are often reasons for deciding in a particular way rather than another which are not objective reasons for the action in the sense referred to above. In order to show this, let us go back to a variation of the example introduced above.

Suppose I have to decide how to invest my money but I haven't the faintest idea of what would be the best way to get a good profit/time ratio for my money. I then take the wise step of consulting an expert who is, I have reasons to believe, the best advisor I could get, and he tells me to invest all my money in foreign currency. I now have reasons to invest in foreign currency and, other things remaining the same, deciding to invest in something else would be a mistake. One might say that I don't have a reason to *decide* to do something, but only a reason to *believe* that some facts are the case, and that those facts are actually the case is a reason for me to decide to invest in foreign currency. That is true, but it is hardly an objection to the point I am trying to make. In order to make it clear why, let us suppose now that the expert is wrong because the government never thought of devaluing the national currency or because other factors the expert never considered relevant (but which were there all along) come into play so that the price of foreign currency doesn't actually rise much even after the government's intervention. As an investment, my buying foreign currency was disastrous, but there is a sense in which my *decision* was not a mistake. Otherwise, one would have to admit that the right *decision* in the case would have been to trust someone who knows nothing about investment (me) instead of the person I recognise as someone who knows a lot about it. If I am right, a rationally correct decision (which takes into account the correct reasons for deciding) does not necessarily lead to a correct action. Consequently, reasons to decide in a correct decision-making process are not necessarily the reasons for action which are in the world. To

¹⁰ See Raz, J. *Practical Reasons and Norms*, p.16 ff.; see also Detmold, M. J. *The Unity of Law and Morality* London: Routledge & Kegan Paul, 1984, p. 8 ff.

sum up: it is possible that I make the right decision to do the wrong thing.

Let us now leave financing aside and move back into the ethics of public decision-making which is, after all, the main concern of this chapter. The first thing that has to be settled is the relevance of all that to ethics. The relevance is simply that having taken the right decision often works as a *moral excuse* for those who perform wrong actions. If I did everything I could do, given my limitations which I cannot eliminate before performing the action, and if I correctly balanced my reasons to decide under those conditions of limitation, I have a claim to be excused, although it may sometimes not be enough¹¹.

Reasons *for action* and reasons *for deciding* are both practical in the sense that one can judge through those reasons either the correctness of the action or the correctness of the decision to act. Although political power can create reasons for action, for instance, by deciding to impose sanctions on a given action, I believe that the kind of authoritative reasons Raz has in mind are *reasons for deciding* rather than *reasons for action*. On this reading of Raz, the peculiarity of authoritative decisions seems to reside in the fact that the action which changes someone's moral landscape is just a statement by the public authority about how the agent should act. Raz's normal justification thesis could then be understood as an attempt to state the general conditions under which this sort of interference by the political authority in the subject's autonomy is justified. I shall analyse Raz's normal justification thesis in the next section, but let me just make clear that, beside Raz's, there are other possible justifications for someone to have the power to intervene in someone's strong autonomy. When, for instance, a conclusion about how you should behave comes from someone that you have reasons to believe to be much wiser than you are, it must be correct to trust his judgement. In this case, beside the reasons that I take into consideration, I put the opinion of the wise man and I am justified in doing so¹². I shall discuss later some objections to this opinion, notably those according to which my depiction of reasons for deciding should be taken as being part of theoretical rather than practical reasoning and that, therefore, my explanation makes authoritative reasons a species of theoretical reasons. What is important at this stage is to notice that, even if Raz's argument does not work as a justification for the power to intervene into someone's strong autonomy, there might be other arguments that do indeed work.

¹¹ I am grateful to Fernando Atria for this insight.

¹² This example is an instance of Raz's 'normal justification thesis', to be examined later in this chapter.

Those holding political power very often claim to have authority in this sense, that is to say they claim that all those towards whom they have authority have a moral obligation to take their directives as reasons for deciding to act in the recommended way. Law is one sort of institution that claims authority if not always, as Raz, Soper, Green and others¹³ believe, at least often enough. One of the questions for practical philosophers to answer is under which conditions this claim is justified. One might say the question of political obligation is, together with the question concerning the entitlement of the holders of political power to use coercive force against citizens, the central problem of political philosophy¹⁴. In spite of its relevance in political philosophy, I shall deal with the problem of under which conditions one has an obligation to obey the authoritative political decisions (with special regard to law) only as far as those conditions have (or are said to have) a bearing on the much more modest problem that concerns me in the present chapter, to wit: whether or not those authoritative reasons insulate themselves from other sorts of practical reasons in practical decision-making processes. Indeed, the truth of either of the competing theories about the obligation to obey the law may or may not be relevant to the way in which decision-making processes should be shaped. It is, for instance, irrelevant whether the obligation to obey the law is a natural duty or an acquired obligation. Think of the way Jeremy Waldron characterises each theory:

“Theories of acquired obligation are more familiar [than theories of natural duty] in political philosophy: our obligation to the state is said to be based on consent or, using the principle of fair play, on the willing receipt of benefits from other’s co-operation. The theory that we have a natural duty to support the laws and institutions of a just state - the theory that the requirement of obedience is not contingent on anything we have said or done - is less well known and the literature discussing it much less extensive.”¹⁵

If either of those theories is true, we are always led to the conclusion that under some conditions there is an obligation to obey authoritative directives by the state. It follows that either sort of theory could equally ground the claim that an authoritative legal directive is a

¹³ See J. Raz’s *Morality of Freedom*, cit., pp. 76-77; a more recent restatement is in Raz, J. *Authority, Law and Morality* in Raz J. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, pp. 215ff ; Soper accepted that law makes authoritative claims in his *Legal Theory and the claim of authority*, but later rejected this thesis in *Law’s Normative Claims* in: Robert P. George (ed) *The Autonomy of Law* Oxford, Clarendon Press, 1996, pp. 215-247; see also L. Green’s *The Authority of the State* Oxford: Oxford University Press, 1988, esp. chapters 8 and 9.

¹⁴ See Dworkin, R. *Law’s Empire* London: Fontana Press, 1991(1986), p.191.

¹⁵ Waldron, Jeremy *Special Ties and Natural Duties* *Philosophy and Public Affairs* 22, n.1 (winter 1993) p.3.

moral reason for action and that this reason could, in principle, tip the balance of reasons. One might say, however, that whether one or another theory is correct has a bearing on my argument about the relations between authority and autonomy. Theories of acquired obligation, it might be argued, ground the change provoked in someone's moral landscape in her own act of will (either because she explicitly consented or because she accepted the benefits brought about by the political structure) and, for that reason, the agent is ultimately autonomous, even when she has an obligation to obey the political decision. But this misses my point completely. If those theories of acquired political obligation are used to justify authority at all, it follows that the relevant fact (consent, willingness to accept benefits) precludes the subject's right to decide whether the authoritative directive will or not have moral force over her. If those theories justify authority, one may not obey the directive and one may even be correct to do so, but one cannot deny that there is a moral reason for obeying the authoritative directive. One might, on the other hand, use a given theory of authority in order to show that under no conditions can authority be justified or that the theory would justify authority only in absurd circumstances. If one carries the argument on which Wolff grounded his thesis that only unanimous direct democracies can legitimately exercise authority¹⁶ to its extreme, one might reach just such a conclusion. If it is true that self-rule is the only ground on which authoritative rules could possibly be justified, there is no reason why my past self-ruling should take precedence over my present self-rule¹⁷. If this were correct, it would follow that a general obligation to obey the law would not exist and there would be no authoritative directive in the sense explained above. But even this use of 'acquired obligation' theories would have little bearing on my argument here. Denying that there is a *general* obligation to obey the law does not preclude the existence of a *specific* obligation to obey the law. I may have a reason to obey the law because I promised to do so, or because I know that if I don't follow the law my father will be so outraged that he would have a heart attack or for many other reasons. I trust we will all share the intuition that in particular situations, at the very least, one might have good reasons to obey the law. If this is so, even the use of acquired obligation theories to refute a general obligation to obey the law would be irrelevant to my argument.

Raz's theory of political obligation seems to have a special bearing on the problem of whether

¹⁶ Wolff, R. P. *In Defense of Anarchism* New York: Harper Torchbooks, 1970, p. 21ff.

¹⁷ Green, L. *The Authority of the State* Oxford: Oxford University Press, 1988, Chapter 2.

of not some kinds of reasons should be excluded altogether from the practical decision-making of those subject to the political authority. I shall devote the second section of the present chapter to showing that, contrary to Raz's own opinion, his theory of political authority fails to justify the exclusion non-authoritative reasons for deciding from those decision-making processes to which authoritative reasons for deciding apply.

Pre-emption in Legal Reasoning

The main concern in this chapter is, as it was said before, to provide an account of the interplay between authoritative legal reasons and non-legal reasons for action in practical reasoning and, more specifically, of the sense in which authoritative legal reasons can be said rightly to exclude other sorts of substantive considerations from particular instances of practical reasoning. One of the most important contemporary defences of the exclusion of substantive considerations by legitimate legal reasons for action is to be found in Raz's work on legitimate authority and pre-emptive reasons for action. I shall take Raz's account as a guideline in what follows and, in defending some aspects of it and attacking others, I expect to make my own view on the subject clear.

Raz's pre-emptive reasons have been subject to intense scrutiny over the past two decades¹⁸. Some critics have argued that one cannot conceive of how reasons should be pre-empted from entering the process of practical decision-making, if this process aims at bringing about the correct moral action¹⁹. Other critics have argued that, although the idea of pre-emption is itself sound, Raz's account of it is not correct²⁰. A third objection was recently put forward by Fernando Atria, who argued that legal reasoning cannot do without substantive considerations, so that Raz's conception of exclusion would not help in the least to understand *legal*

¹⁸ Just to mention a few, Detmold, M. J. *The Unity of Law and Morality* London: Routledge & Kegan Paul, 1984, pp. 133 ff.; Soper, P. *Legal Theory and the Claim of Authority* *Philosophy and Public Affairs*, Vol. 18, p.216 ff.; Schauer, Frederick *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* Oxford: Clarendon Press, 1991, passim; Marmor, Andrei *Interpretation and Legal Theory* Oxford: Oxford University Press, 1984 pp. 117 ff.; Atria, Fernando *Legal Reasoning and Legal Theory Revisited* *Law and Philosophy*, Vol. 18, p. 566 ff.; Christodoulidis, Emilios *The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular* *Law and Philosophy*, Vol. 18, Issue 2, pp. 225 ff.; Bankowski, Zenon *Don't Think About It: Legalism and Legality* in Karlsson et al *Law, Justice and the State* Berlin: Dunker & Humblot, 1993, p. 52.

¹⁹ Detmold, M. J. *Law as Practical Reason* *Cambridge Law Journal*, Vol. 48, Issue 3, p.436-471.

²⁰ Soper, P. *Legal Theory and the Claim of Authority*, cit.

reasoning²¹. Instead of restating those objections to Raz's concept of pre-emptive reasons I shall be trying to explain in what follows why I believe that Raz's pre-emptive reasons fail to do the job he requires from them *in terms of his own theory*. The argument runs as follows: in order for second-order reasons (of which 'pre-emptive' reasons are an instance) to provide an intermediate level of reasons between deeper level considerations and concrete decisions²², there must be no possibility whatsoever that a first-order reason defeats them. That is the question of, as Detmold put it, 'the exclusion of exclusionary reasons'²³. I believe that the reason Raz offers for considering legal reasons as second-order reasons (fundamentally, the normal justification thesis) does not do the job and the argument in this section aims at proving that the normal justification thesis is not able to ground the exclusion of exclusionary reasons from decision-making processes²⁴. It would follow that, in the case of legal reasons at least, the weight of first-order reasons might make a difference as to whether or not the second-order reason applies and, as a result, legal decision-making processes must include an appreciation of the weight of first-order reasons.

Let me start to expose my argument by analysing Raz's normal justification thesis, which expresses the normal condition to be fulfilled by legitimate authority:

"The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons that apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly"^{25 26}

²¹ Atria, Fernando *Legal Reasoning and Legal Theory Revisited*, cit.

²² Raz, J. *The Morality of Freedom*, cit., p. 58.

²³ Detmold, M. J. *The Unity of Law and Morality*, cit., p. 134.

²⁴ Detmold believes that there are arguments that are indeed able to exclude exclusionary reasons (op. cit., p. 133-36). I shall not dispute the matter here, for I believe that, regardless of whether or not there are arguments that are able to justify this double exclusion, the argument put forward by Raz to insulate *legal reasons* from first-order reasons is not one of them.

²⁵ Raz, J. *Authority, Law and Morality* in Raz J. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, p.214.

This condition for the legitimacy of someone's authority, says Raz, at the same time reinforces and is reinforced²⁷ by the imperative expressed in the dependence thesis, according to which

“All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives”²⁸

If the condition stated in the normal justification thesis is met, authority is legitimate and it is morally correct for the subject to perform the action required by the authority without taking into account the reasons that would apply to him if the authoritative directive had not been issued. This amounts to a very rough version of the pre-emption thesis, whose full statement is:

“The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when accessing what to do, but should replace some of them”

The pre-emptive thesis was formulated so that it contradicts another account of how authoritative directives (including authoritative legal rules) relate to other reasons for action. According to this alternative account:

“...to accept the legitimacy of an authority is simply to accept that whatever other reasons there may be for a certain action, its being required by the authority is an additional reason for its performance.”²⁹

I shall argue later that Raz's description of the interplay between authoritative legal reasons for action and non-authoritative reasons for action, given the best possible understanding of both the pre-emption and the normal justification thesis, does not imply a complete insulation of secondary from primary reasons and that, for that reason, there is some truth in the theory according to which authoritative reasons are to be weighed against non-authoritative reasons (although, as we shall also see, *logically* speaking Raz's theory has the best of this exchange).

²⁶ It is interesting to notice how a similar understanding of the necessary condition for a rational agent to follow authority was used by Gadamer to ground the rationality of following a living tradition. In his *Truth and Method* (2nd ed. London: Sheed & Ward, 1989), Gadamer defines the rationale behind the prejudice according to which following the tradition was in principle correct in terms very similar to Raz's: “But this [blind obedience] is not the essence of authority. Admittedly, it is primarily persons that have authority; but the authority of persons is ultimately based not on the subjection and abdication of reason but on an act of acknowledgment and knowledge - the knowledge, namely, that the other is superior to oneself in judgment and insight and that for this reason his judgment takes precedence - i. e., it has priority over one's own.” p. 279.

²⁷ Raz, J. *The Morality of Freedom*, cit., p.55.

²⁸ Raz, J. *Authority, Law and Morality*, cit., p.214.

Before dealing with Raz's insulation claim, I shall defend the normal justification thesis against a number of misguided objections and, in doing so, I hope to present it in its strongest version. I also hope that this strong version of the normal justification thesis will make it clear why, in the way Raz conceives it, legitimate authority creates *reasons for deciding* rather than *reasons for action*.

First, Raz's normal justification thesis could be said to be innocuous for, in any first person practical deliberation, one has to know what the correct action in the particular situation is in order to decide if the condition for obedience to authoritative directives stated there (i.e. "that one is *likely better to comply* with reasons that apply to him" if he accepts the directives of the alleged authority as binding) is fulfilled. If this were the case, the citizen subject to authority would have to go all the way through the deliberation process and find out what it is right to do and, if he knows that he would have no reason to follow the authoritative directive, since once he knows what is correct, following the authoritative directive instead of his own reasons cannot make it *more probable* that the subject would comply with the reasons that apply to him. But this argument would only defeat Raz's conception of legitimate authority under the condition that the only way to know if following a directive would more probably lead one to perform the correct action than one's own reasoning is to know for sure what the right answer would be. That is plainly not the case: when one who is completely ignorant on financial markets asks a specialist for advice about investment, one knows that following the advice would lead more probably to the right investment. Under conditions of unlimited time and resources, it might be correct, if one believes self-determination to be valuable, to learn as much as possible about financial markets in order to decide how to invest. Under conditions of limited time and resources, that would be a very foolish way to decide how to invest one's money.

One could then argue that this sort of argument of expertise only works under two conditions, one of which cannot be fulfilled in any instance of practical decision-making, while the other cannot be fulfilled in the specific case of moral decision-making. The first is a continuation of the objection above: it is not possible to know if someone is better prepared to take decisions if one cannot compare the decisions that should be taken and the advice given. This is again plainly not true, since I can easily recognise that someone is more competent in some areas of

²⁹ Raz, J. *The Morality of Freedom*, cit., p. 40-41.

decision-making than I am, for instance, from my knowledge of his background or from the fact that in the past he often pointed out mistakes in my practical reasoning which I later on came to recognise as mistakes³⁰. The other objection is that this sort of justification can only justify technical-practical decisions because the ends are set by the person subject to the authority, and the advice is only about how better to achieve those ends. Without the subject having a notion of what is a correct action beforehand there is no way in which she can judge whether or not she is more likely to perform the correct action if she follows the advice (or, if she wants to pursue the previous objection to its fullest, whether or not it is possible to assert that someone has a successful past record in the field). So, if I am asking for advice in my investments, I can only regard expert advice as authoritative if I know what a good investment is (let's say, one that gives more return in a shorter time). There resides the truth of this critique of Raz: one has to have an idea of what counts as morally good which is independent of what the authority says in order to judge if one is more likely to perform the morally correct action when following the authoritative directives. But this is hardly a decisive objection to Raz's theory of legitimate authority. Those considerations of what counts as good are secondary reasons and set the limits of the legitimate authority for every subject. But knowing what is correct in general doesn't imply knowing what is correct in a particular instance. I may believe that promoting equality is the correct thing to do when one is deciding what to do with one's money and still not know if I should give my extra money to the government or to share it amongst all the beggars I know, for I might not know what is the best way to achieve equality. Now suppose that someone whom I regard as having more technical knowledge about whether giving the money to the beggars or giving the money to the government will improve equality tells me that giving the money to the beggars is the best course of action, given my aim of furthering equality. In this situation, would it be correct for me to give it to the government? Plainly not. This intervention has the potential power of changing my moral landscape. Even if the person I regard as being a specialist is wrong in this particular case and giving money to the government would eventually prove to be more effective in bringing equality about than sharing it out to the beggars, the intervention of this much more knowledgeable person who understands much better than I do the inner mechanisms of the government and the behaviour of beggars to whom money is given makes it morally defensible to follow his advice. Acting against his advice may bring about more equality (if the expert

³⁰ McMahon, Christopher Autonomy and Authority *Philosophy and Public Affairs* 16 (1987), p.309

turns out to be wrong), but my decision of not following his advice cannot be justified, since it is wrong to perform an action that one has reasons to think is morally worse than an alternative. Of course one does not need to restrict this argument to 'thicker' moral concepts such as equality. The same applies to the thinnest moral concepts like 'correct' and 'good'.

Soper adopted another line of criticism in arguing that Raz's understanding of the authority of law as being grounded in the condition expressed in the normal justification thesis "virtually eliminates the traditional distinction between theoretical and practical authority"³¹. Soper then goes on to claim that the practical authority of law implies what he calls double pre-emption and, based on that, he establishes the difference between theoretical authority about practical matters (the authority of expertise as stated in the normal justification thesis) and practical authority (or at least the practical authority of law).

"practical authority claims complete content-independence (which entails pre-emption) whereas theoretical authority claims only pre-emption"³²

Again, I have no reason to dispute Soper's claim here. Even if theoretical authority is what Soper claims it is, it suffices to point out that if the law (or rather, the law-givers) is (are) taken to have this sort of authority based on expertise in a particular case which consists of the directive that action x is right, this is enough for the subject that regards it as theoretically authoritative to have a reason to believe that action x is right. The apparently sharp distinction between reasons to believe and reasons to act collapses when one has a reason to believe that an action should be performed³³. Such a reason is itself a reason to act and this is a fact of the grammar of beliefs. To say 'All applicable reasons support the belief that x is the right to do, but I don't have any reason to do x' makes as much sense as saying that 'All applicable reasons support the belief that the cat is on the mat, but there is no reason to believe that the cat is on the mat'. If I am right that a reason to believe that an action is right is a reason to perform that action, it follows that this sort of 'theoretical' authority which gives you those sorts of reasons to believe become *ipso facto* relevant for the decision-maker's practical reasoning.

³¹ Soper, P. Legal Theory and the Claim of Authority Soper, 18, Philosophy and Public Affairs (1989) p.224.

³² Soper, P. Legal Theory and the Claim of Authority Soper, 18, Philosophy and Public Affairs (1989) p.225.

I hope that from the preceding discussion a picture has emerged of the conditions under which the normal justification thesis can justify the use of authoritative directives as guides for decision-making, even in situations in which the reasons for action point in another direction. In that picture, *reasons for deciding* in a particular way might be introduced by the normal justification thesis, even if the normal justification thesis does not generate *reasons for action*. Notice that that is not to say that other arguments cannot be provided that explain how, say, legal orders can create new reasons for action. That law facilitates co-ordination is, for instance, one of those reasons. What I am saying is simply that the *normal justification thesis* does not ground the creation of new reasons for action, but only of new reasons for deciding.

But Raz's claim is not only that the fulfilment of the condition stated in the normal justification thesis makes the authoritative directive a reason for deciding in a particular way. According to him, the fulfilment of the conditions specified in the normal justification thesis makes the authoritative directive into a reason of a specific kind which relates (or should relate) peculiarly to other kinds of reasons in particular instances of practical reasoning. This kind of reason Raz calls 'exclusionary' or 'pre-emptive'. Pre-emptive reasons are reasons that render other reasons for action not applicable to a particular case. This is clearly not enough to characterise pre-emptive reasons, since the same could be said of all 'winning' reasons for action. If one reason outweighs all other reasons it seems accurate to say that it renders other reasons not applicable to the case. Pre-emptive reasons, as Raz pointed out, exclude reasons for action in a particular way; they do not exclude reasons for action by outweighing them, but by the application of "a general principle of practical reasoning which determines that exclusionary reasons always prevail when in conflict with first-order reasons"³³ Pre-emptive reasons are examples of second-order reasons, which means that they are reasons to act or refrain from acting for a primary reason³⁵. Primary reasons, in Raz's terminology, are reasons either to perform or not to perform a particular action. Secondary reasons can be rendered inapplicable to one case by another second-order reason, but can *never* be challenged by a first-order reason. Challenging a pre-emptive reason with a first-order reason implies either completely denying its pre-emptive nature or denying that its scope covers a particular set of

³³ A similar view was put forward by Postema in his distinctions between direct and indirect guidance of actions by reasons, see Postema, Gerald J. *Jurisprudence as Practical Philosophy*, cit. p. 346.

³⁴ Raz, J. *Practical Reasons and Norms*, cit., p.40.

³⁵ Raz, J. *Practical Reasons and Norms*, cit., p.39.

primary reasons. This challenge, says Raz, can only be performed by second-order reasons. All reasons which concern the pre-emptive nature of a particular reason and the scope of this pre-emption are second-order reasons (to refer to the latter, Raz uses the expression 'scope-affecting reasons'³⁶). It is clear that, for a reason to be pre-emptive of other reasons in a particular instance of practical reason, it is necessary that some issues concerning its pre-emptiveness and the scope of its pre-emption have to be settled.

Practical reasoning, understood here as reasoning which aims at informing action, can be performed at the second-order level. Theoretical reasoning which uses primary reasons *is not* pre-empted by pre-emptive reasons, since "it is merely the action for some of those reasons which is excluded"³⁷. One could still *hold an opinion* on whether or not the performance of the particular action required by the authority is right. Effectively one could even reason about whether or not this opinion is true. What one cannot do, according to Raz, is to *act* on those reasons. Deliberating, concluding that the authority is wrong and even criticising the authority are actions that are not excluded by pre-emptive reasons.

The relevant question for a practically rational agent is whether or not Raz's justification for the existence of authoritative (including legal) reasons succeeds in justifying that primary reasons be insulated from secondary reasons in actual contexts of decision-making. The first step in that direction would be to ask about the credentials of the normal justification thesis as a reason that cannot itself be defeated by any moral reason. Those credentials, I believe, are acceptable and, indeed, that is the greatest strength of Raz's argument about pre-emptive reasons. Moral values cannot defeat it simply because the normal justification states the *correctness of doing what is most likely to be the correct thing to do*. If we spell out some of the non-stated conditions for its plausibility (fallibility of human judgement, the existence of different levels of moral insight), the normal justification thesis is not so much a moral directive as it is a self-evident statement about a particular structural feature of morality. That one should always *aim* at doing what is right is trivial. Sometimes we fail because we are incontinent³⁸, and sometimes because we have the wrong idea about what is the right thing to

³⁶ Raz, J. *Practical Reasons and Norms*, cit., p. 46.

³⁷ Raz, J. *The Morality of Freedom*, cit., p. 42.

³⁸ See Aristotle's discussion of the *Acratic* in the *Nicomachean Ethics* (1146b31-1147a24) and also MacIntyre, Alasdair *Whose Justice? Which Rationality?* London: Duckworth, 1988, p. 112. See also Davidson's Discussion of Weakness of Will in *How is Weakness of Will Possible?* in *Essays on Actions and Events* Oxford: Clarendon Press, 1980, p. 21-42.

do. Someone who states the intention to act wrongly must think that acting wrongly is the right thing to do in a particular situation³⁹. In the discussion which opened this section, I tried to unveil some of those conditions of plausibility which, once incorporated into the formulation of the normal justification thesis, would make it self-evident. But the fact that the normal justification thesis cannot be defeated by substantive moral values does not imply that it can justify pre-emption of reasons. As we shall see, as it often happens with arguments that follow from tautologies, the source of its irrefutability is also the source of its impotence.

Let me start by introducing an example. Suppose that the legal authority issues the following directive: "Smoking anywhere in the new building of the Scottish Parliament is forbidden - Fine £ 5.00". Let's assume that I have a reason to believe that my abiding by the authoritative directive makes me more likely to comply with reasons that apply to me than if I try to follow the reasons which apply to me directly. At this point, someone raises the question of whether the authoritative directive is right or wrong and I start wondering whether the thing required by the authority is the best thing to do after all (remember that I am not forbidden to think about those things, only to think of them as reasons for my action). If the reasons I produce against the action being performed are not good, nothing changes; but suppose I arrive at the conclusion that the action required by the authority is conclusively wrong (remember that I can hold such an opinion). Can I hold this opinion and at the same time hold the opinion that I am more likely to comply with reasons that apply to me by following the directive than if I try to follow the reasons which apply to me directly? If I follow the authoritative directive in this situation I have no possibility of doing the right thing; if I follow my own appreciation, the worst I can do is to equal the 0% probability of doing the right thing that following the authority would imply. The fact that I know for sure that the authoritative directive is wrong implies that I cannot consistently claim that the normal justification thesis justifies my following the authoritative rule.

What I am trying to get at here is that, up until this point in Raz's argument, there is no reason why a jolly good first-order reason against the authoritative rule wouldn't imply the existence of the following second-order reason: "it is not probable that I will do what is right by following the authoritative order". Second-order reasons are not precluded from the second level of reasoning and, therefore, they would have to be taken into consideration. It follows

³⁹ MacIntyre, Alasdair *Whose Justice? Which Rationality?*, cit., p. 112.

that, if primary reasons are to have no influence in the practical deliberation on matters covered by authoritative rules, a reason would have to be provided to explain why those sorts of second-order reason would be also precluded from decision-making. Raz does not explicitly provide arguments to explain this further preclusion, but he hints at some possible ways in which it could be justified. Those hints are often to be found in arguments that don't deal directly with the problem I am dealing with here. The first of those arguments is an attack on the thesis that authoritative reasons are *prima facie* reasons for action which should be weighed against all other reasons for action. Notwithstanding the specific aim, the argument (if it is correct) hits the much bigger target of justifying complete insulation of secondary reasons from primary reasons.

The argument is a justification for surrendering one's judgement to the authority altogether. This surrender will be justified if this will decrease my rate of mistakes in a particular area. The first step Raz invites us to take is to

“[c]onsider the case in a general way. Suppose I can identify a range of cases in which I am wrong more than the putative authority. Suppose I decide because of this to tilt the balance in those cases in favour of this solution. That is, in every case I will first make up my own mind independently of the ‘authority’s’ verdict, and then, in those cases in which my judgement differs from its, I will add a certain weight to the solution favoured by it, on the ground that it, the authority, knows better than I. This procedure will reverse my independent judgement in a certain proportion of the cases. Sometimes even after giving the argument favoured by the authority an extra weight it will not win. On other occasions the additional weight will make all the difference. How will I fare under this procedure? If, as we are assuming, there is no other relevant information then we can expect that in the cases in which I endorse the authority’s judgement my rate of mistakes declines and equals that of the authority. In the cases in which even now I contradict the authority’s judgement the rate of my mistakes remains unchanged i. e. greater than that of the authority.”⁴⁰

At first sight, Raz’s conclusion doesn’t seem to follow from the premises of his argument. It would seem that the most effective way to enhance my moral performance is to disobey the authority in all those cases in which the authority is wrong and accept its authority in all those cases in which the authority is right. Following that strategy, my overall performance will be better than it would be had I strictly followed either my own independent judgement or the authority’s directives. But how could this further scenario happen? There is a need for a

⁴⁰ Raz, J. *The Morality of Freedom*, cit., p. 68.

criterion to decide when it is right to follow the authoritative directive and when it is wrong to do so. Whichever criterion one puts forward, it will question the assumption that the authority knows better in the field and, if this assumption is defeated, the directives are not regarded as authoritative, for the grounds for authority established by the normal justification thesis would be challenged. One is just specifying an area in which authority is not recognised. As Raz puts it:

“Of course sometimes I do have additional information showing that the authority is better than me in some areas and not in others. This may be sufficient to show that it lacks authority over me in those other areas. The argument about the pre-emptiveness of authoritative decrees does not apply to such cases”⁴¹

My claim is that this additional information may simply be the fact that the agent is sure that one particular course of action required by the authority is wrong according to the primary reasons relevant to the particular case. Of course sometimes the agent would believe the authority is wrong, but, not being very sure about it and recognising the authority’s higher competence in the area, she may be inclined to surrender her judgement. But this doesn’t need always to be the case. There is no reason to reject the thesis according to which, in every particular case of practical reasoning in which putative authoritative claims authority, the claim of authority is itself open to challenge from primary reasons.

I believe Raz would not be happy to allow this sort of leakage from first-order into second-order reasoning, since part of the point of having rules is to provide “an intermediate level of reasons”⁴² between deeper level considerations and concrete decisions. Indeed, if this leaking really happens, the pre-emption of primary reasons may be describing the logical order of a correct course of reasoning, but, for the particular agent, legal and non-legal reasons will interact in much the same way as other reasons interact, to wit: strong non-legal reasons for action will be able to debunk specific legal reasons for action if they are strong enough.

Raz hints at yet another defence of the insulation of secondary reasons from primary reasons which is more to the point here. He defends the insulation of authoritative reasons from straightforward substantive reasons against the charge that ‘in every case authoritative directives can be overridden or disregarded if they deviate too much from the reasons which

⁴¹ Raz, J. *The Morality of Freedom*, cit., p. 68-9.

⁴² Raz, J. *The Morality of Freedom*, cit., p. 58.

they are meant to reflect'⁴³. If this is the case, it would be required from 'every person in every case to consider the merits of the case before he can decide to accept an authoritative instruction'⁴⁴. Raz perceives that this objection does not challenge the pre-emption thesis, only the mediating role he believes authoritative directives have. As he sees it, this objection is mistaken because it confuses clear mistakes with big ones, for, in order to establish if someone is clearly mistaken, there is no need for reasoning, and he concludes that

"It is not the case that legitimate power of authorities is generally limited by the condition that it is defeated by significant mistakes which are not clear"⁴⁵

Raz's concession that *clear mistakes* by the issuer of the authoritative directive can allow first-order reasons to leak to the second-order level of reasoning is quickly followed by the warning that this does not imply that *big mistakes* have the same effect. Therefore, there is no need for reasoning thoroughly in order to find out if a mistake was great enough to put authority in check or not. But wouldn't the possibility that the authority makes big mistakes imply that we have the moral obligation of not stopping our investigation of the morality of an action at the level of the *prima facie* moral intuition? Sometimes an action which does not seem remarkable *prima facie* turns out to be clearly wrong after reflection. If, in following authoritative rules, there is a possibility of making a big mistake, one of the obligations one might have is to try to clarify the situation. If, after reflection on the rights and wrongs of the case, no clear conclusion results, one might decide to follow the authoritative directive based on the fact, say, that the issuers of the rule seem to have a better idea of what is going on morally than the agent. But that would only happen after practical reflection was carried out⁴⁶.

Finally, Raz offers an argument to the effect that 'the pre-emption thesis depends on a distinction between jurisdictional and other mistakes'⁴⁷. Some mistakes by the authority, says Raz, are about factors that determine the limits of the authority's jurisdiction, others do not concern it. The former are never pre-empted, while the latter always are. Raz offers no reason why this distinction should be taken as morally relevant. In the absence of such justification (which I don't believe could be provided), my argument against pre-emption stated above

⁴³ Raz, J. *The Morality of Freedom*, cit., p. 61.

⁴⁴ Raz, J. *The Morality of Freedom*, cit., p. 61.

⁴⁵ Raz, J. *The Morality of Freedom*, cit., p. 62.

⁴⁶ This paragraph's argument relies on the plausible assumption, stated in chapter one and incorporated one way or another in the arguments of the second, and third chapters, that reasoning makes it more likely that the agent would reach the morally correct conclusion.

cannot be easily put aside. But, even if such justification could be provided, it would have to be grounded on a moral reason systematically prior to the first-order moral reasons. That would be the only way to explain how this moral reason wouldn't itself have to be weighed against first-order moral reasons. In the last chapter, I've already presented my reasons against the thesis that some moral reasons are systematically prior to other moral reasons. If I am correct on that, it follows that no justification that Raz could offer for the moral relevance of the distinction between jurisdictional and other mistakes would be able to exclude first-order reasons from an agent's practical decision-making process.

I believe I have provided by now sufficient evidence for my claim that Raz's attempt to justify the pre-emption of certain reasons fails on its own terms. But perhaps the problem is not so much the idea of pre-emption but Raz's conception of pre-emption. Perhaps what is needed is another formulation of Raz's original insight that some reasons should be pre-empted from the deliberation process. Philip Soper tried to provide an alternative account of authoritative reasons' pre-emptive nature in which the idea of pre-emption is taken one step further. But does Soper's *double pre-emption* thesis succeed in justifying the insulation of first-order from second-order reasons?

According to Soper, to say that the law is doubly pre-emptive means that it:

“... typically intends to pre-empt (in the sense of rendering practically irrelevant) deliberations about both the content of the law and the legitimacy of the legal system.”⁴⁸

According to the double pre-emption thesis, an agent would not be treating a directive as authoritative if she performs her action because she has good reasons for treating the authoritative directive as legitimate. In this case, even the second level of practical deliberation is closed to the agent and conclusions about the authority being illegitimate would make no difference to her following the authoritative directive. Notice that my objection to Raz's conception of pre-emption does not apply to Soper's. My argument against Raz is simply that good first-order reasons imply a second-order reason that might be able to defeat the reasons one might have in favour of the pre-emption of that particular reason. If it is true that legal reasons do indeed *pre-empt all second-order reasons* concerning the legitimacy of legislative

⁴⁷ Raz, J. *The Morality of Freedom*, cit., p. 62.

⁴⁸ Soper, P. *Legal Theory and the Claim of Authority* Soper, 18, *Philosophy and Public Affairs* (1989), p. 216.

authority from the decision-making process, my attempt to bring first-order reasons back into the reasoning process fails. The probability calculation on which both Raz's argument for pre-emption and my objection to it relied is not an issue here. However, the double pre-emption thesis is problematic for a number of other reasons, some of which are explicitly (even if not fully) discussed by Soper himself.

Just after introducing the concept of double pre-emption as a feature of law's authority, Soper anticipates the objection that, were his conception of authority right, there would be "an insurmountable justification problem: if that is what people mean when they claim to have authority, the claim could never be justified"⁴⁹. The objection is not spelled out in its entirety by Soper. What lies at its bottom (at least in my reading of it) is the fact that, were authority to be understood in the way Soper proposes, there would be no room for deliberation by the agent subject to authority. Following an authoritative directive would mean not reflecting on the rights and wrongs of the situation, which means, denying one's own practical rationality.

Soper's answer to this objection comprises, first, presenting the credentials of his claim by identifying it with a particular tradition of political theory (to which the likes of Hobbes belong) and, second, a theoretical move that pushes justification (practical reasoning) one step back, so that reason and autonomy are not entirely overridden by authority. In Soper's own terms:

"All that is required is that one shift the point of justification back one level: the problem now would be to offer sufficient reasons (as Hobbes tries to) for accepting an assertion that the subject is to deliberate *neither* about the merits of action *nor* about the merits of the claim of legitimacy. Reason in the end would still justify (because subjects could still deliberate, as Hobbes does, about the claim of double pre-emption); but it would be justification of a far more potent claim - a claim that action must be taken even though the action is wrong on its merits *and* even though the directing authority is wrong in its assumption about its own legitimacy."⁵⁰

Soper's answer is related to his belief that legal and political philosophers often fail to distinguish between two rather different problems, to wit: the problem of the moral worth of political institutions and the problem of someone's entitlement to be obeyed. Those are indeed different problems, but Soper believes something else, namely, that the answer to the problem of entitlement to obedience is independent from the answer to the problem of the moral worth

⁴⁹ Soper, Philip Legal Theory and the Claim of Authority, cit., p. 216-217.

⁵⁰ idem. p. 217.

of political institutions. This thesis is not argued for in the article we've been discussing (apart from the reference to the tradition to which his thesis belongs). It is not immediately clear why his thesis should be right and, indeed, some troublesome consequences follow from it.

The first problem that springs to mind is that reflection on the moral worth of political institutions (which seems to be roughly the sense in which Soper chooses to use 'legitimacy'), when entirely divorced from the question whether one should obey the illegitimate authority, seems to have very little practical importance. Which sort of action would be required of an agent who concludes that a given political arrangement is not legitimate? Perhaps, one might say, there follows an obligation to try to change the unjust political arrangements. But, if changing them is against the law, I shall not try to change them, for the considerations about legitimacy would be pre-empted from my particular decision-making process. And, indeed, given the fact that dictators and totalitarian governments have much more often safeguarded themselves through those sorts of legal directives than democracies have, it would follow that, in those situations in which the concept of legitimation is more badly needed, it would be toothless. Of course, one might say that a theory of entitlement to obedience wouldn't allow for totalitarian regimes to be entitled, but, if that were the case, it would follow that the moral qualities of the authorities would be likely to have some relevance in deciding whether one should obey someone's directives and that is not permitted by the double pre-emption thesis.

Soper's claim that a justification could be provided for always obeying the law regardless of the correctness of the action required and of the legitimacy of the authority could be defended against this charge if it takes a slightly different form. It could be said that the justification is independent of the quality of the action and of the legitimacy of the authority, although, in some particular instances of its application, this reason could be defeated by reasons for not acting in the way required by law. That thesis was indeed defended by Soper himself in an earlier article⁵¹. Regardless of his success in providing such justification, it should be clear enough that this sort of justification does not pre-empt first-order reasons, since those reasons applied in a concrete case could, by definition, defeat the obligation to obey the law.

And that brings me to a second and more conclusive (because it relies on fewer assumptions)

objection. If a justification for acting only on legal reasons is provided, it is either the case that this justification is grounded in a value which is absolute (and that would explain why legal rules should always exclude from one's appreciation any other moral considerations), or it is the case that the value on which the justification for obedience is grounded could be challenged by another value. If the latter is the case, in any situation in which the most important value would be at stake, it should have prevalence and any first-order consideration embodying such a value would have to prevail. If the former is the case, it is still possible that, in an instant case, the value that grounds absolute obedience is better served by disobeying the legal rule, in which case a reason for action conveying this value would have to defeat the justification. I shall deal with arguments of this sort in more detail in the last section of this chapter.

Soper's reformulation of the pre-emption thesis does not incorporate the element that makes Raz's normal justification thesis so difficult to object to: Raz's ground for pre-emption, the normal justification thesis, is self-evident (if some elements which are necessary for it to make sense are incorporated into the formulation). No moral value could possibly conflict with the thesis according to which one has to decide to do what would probably be the right action all things considered, unless one wants to deny the ethical enterprise altogether. Unless Soper offers a justification which is not moral but analytical within ethics, his justification for obeying the law without considering any other reason as practically relevant would always be vulnerable to arguments from moral value (either from superior moral value or for a better application of the same value that grounds obedience to law).

Soper's *double pre-emption* thesis is in some respects similar to Bankowski's thesis that under some conditions an agent should not 'think about it'. Before I move on to present what I consider to be the best way to conceive of formal reasons, let me briefly explain the implications of the arguments presented so far in this chapter to Bankowski's thesis that there are times in which decision makers should think about it and times in which they should not think about it. The point of having rules, Bankowski believes, is partly to provide *causes* for behaviour, rather than reasons. Rules are partly analogous to physical obstacles we might find

⁵¹ Soper, Phillip *The Obligation to Obey the Law* in Ruth Gavison (ed.) *Issues in Contemporary Legal Philosophy* Oxford: Clarendon Paperbacks, 1989 (1987), p. 127-155. In this article, Soper offers reasons for a *prima facie* obligation to obey the law which could be defeated by other obligations of superior weight (esp. p. 151-2). Nothing was said about an absolute obligation to obey the law.

when taking a walk. Those obstacles not so much provide us with a reason to walk around them as they effectively *cause* us to do it⁵². Rules work at their best when they transcend prescription and become mere descriptions of states of affairs, as Bankowski showed in his analysis of automated systems. In we have rules 'so that things get more predictable'⁵³. But there is something even more strikingly valuable in letting rules cause us to react in certain ways. Rule-following is also constitutive of morality: although it is *not the whole* of morality, Bankowski argues that it is *a condition* for its possibility. Differently from machines, however, we have an ability to *respond* to situations that is not simply an ability to *react*⁵⁴. This ability to respond is what explains that we might recognise situations in which letting the rules rule our behaviour is not appropriate. As Bankowski puts it:

...humans have this facility ... of not only reacting but of correcting – and on this analogy we might think of that as jumping beyond, learning virtue and thus being able to be virtuous in other circumstances.⁵⁵

But in order to learn this responsive skill, one must engage in the machine-like activity of rule-following⁵⁶. That is the sense in which rule-following (i.e. being causally affected by rules) is constitutive of morality. Now, is any of this inconsistent with my view on pre-emptive reasons? That will depend on the scope of Bankowski's claim.

If what Bankowski means is that there are situations in which one should not think at all, and situations in which thinking is required, in which case the 'it' in the phrase 'think about it' would mean the same as 'what is the right thing to do', me and Bankowski do not disagree. I expect to have shown in the first chapter that there is an argument to ground the thesis that reasoning is not always the morally best decision-making process, and that means that, in some situations, one should not 'think about it'. I actually tried to offer grounds to the claim that a morally good person might be required to let certain facts *cause* her to perform certain actions, and that would, as far as I can see, help to prove Bankowski's point. I haven't dealt with the problem of whether or not rules can be conceived as causes, but I see no reason to disagree with Bankowski's conclusions on this respect. Indeed, I believe that conceiving rules

⁵² Bankowski, Zenon *Living Lawfully* outprint, p.128. The outprint in my possession is the camera ready copy of Bankowski's new book to be published by Kluwer Academics. For that reason, the page references also apply to his forthcoming book.

⁵³ Bankowski, Zenon *Living Lawfully*, cit., p. 127.

⁵⁴ Bankowski, Zenon *Living Lawfully*, cit., p. 131-2.

⁵⁵ Bankowski, Zenon *Living Lawfully*, cit. p. 132.

⁵⁶ Bankowski, Zenon *Living Lawfully*, cit. p. 132.

as causes is one of Bankowski's most important insights, an insight that actually goes against the majority views on the nature of rules, that tend to conceive them as *reasons* to decide to perform an action.

Bankowski believes that the way of life of the law-abiding man requires that he sometimes does not think matters substantively and one of the advantages of doing that is that the law-abiding man's obedience ends up producing the ability of creatively breaking the law (which is part of what being law-abiding is about). However, even on this interpretation of what Bankowski means by 'thinking about it' there may still be some room for disagreement, for I believe that *public agents* should only act on reasons (were the empirical conditions for reasoning, such as enough time and resources, to obtain), while Bankowski, on the other hand, makes no qualifications and seems at times to think that the recommendation of not thinking about it crossed the boundaries between public and private agency. If this is so, we do indeed disagree at least partially.

I believe that, if Bankowski is right in his beliefs that, first the only way to be law-abiding is sometimes not to think about the right thing to do and, second, that being law-abiding is a morally desirable trait of character, it may be that judges are morally compelled not to develop it. Under those assumptions, judges would be faced with a moral choice of the sort identified in chapters one and two, that is, a choice between the need for moral self-improvement and the need for moral certainty when other people's lives hang in the balance. Although I don't have a general recommendation for all situations in which that choice arises, I tried to provide arguments in chapter two for the conclusion that, in contexts of public decision-making, it would generally be better to choose to satisfy the latter need at the expense of the former. If that looks unfair to judges, it is because it is. But there is no guarantee that in morality all agents can have it all. As Greek tragic poets understood so well, nothing in moral obligations guarantees that their fulfilment will bring no moral loss.

There is, however, a second interpretation of the phrase 'don't think about it'. In this second interpretation, the 'it' in the phrase refers to a formal rule that is applicable to the case at hand and the advice not to think about it means that one should not think about the reasons behind the formal reason. In that interpretation, it is not *reasoning* that is not recommended, but *substantive reasoning*. This seems indeed to be the interpretation favoured by Bankowski when he writes that 'We treat the [formal] reason as conclusive because it is there, we do not

need to inquire behind it and 'think about it'⁵⁷. I wish to express no view on whether or not this sort of exclusion can be morally justified for private decision-making, but the arguments provided in this chapter aim to show that public agents must always think about it. What my argument against Raz and Soper tried to prove is simply that they offer no good reason for public agents not to *reason substantively all the time*. But if those arguments fail, how can we conceive of formal reasons? That is the question I consider in the next section.

Formal Reasons

Raz is not the only legal theorist to identify the formality of a legal reason for action with its capacity to exclude other reasons. More importantly, his argument grounded on the normal justification thesis is not the only argument put forward to justify that conception of law's formality. Indeed, there are arguments which seem to render the exclusionary conception of the formality of law plausible, without making use of the idea of secondary reasons. I shall now move on to investigate whether or not, and in which sense, those arguments are able to justify the exclusion of reasons from decision-making processes. In what follows, I shall use Atiyah's *Form and Substance in Legal Reasoning* as a paradigmatic presentation of this sort of argument. However, before I deal with the arguments themselves, let me first ask what exactly is the claim that those arguments are supposed to ground.

The claim, as Atiyah puts it, is that, whenever formal reasons are in play, '[t]here is no question of weighing one set of factors against another'⁵⁸ for '[t]he formal reason ... simply excludes from consideration any countervailing reason'.⁵⁹ If the formal reason is good, 'all other argument is irrelevant'⁶⁰. Again, what seems to be at stake is an exclusion by kind of some sorts of reasons by the formal reason. But the claim is often qualified. This exclusion only happens, 'within certain limits'⁶¹. As Atiyah puts it:

If a statute seems ambiguous, or unclear, or if it produces results which seem grossly anomalous or utterly absurd or perhaps even seriously unjust, then courts may avoid applying the statute.⁶²

⁵⁷ Bankowski, Zenon *Don't Think About It: Legalism and Legality* in Karlsson et al *Law, Justice and the State* Berlin: Dunker & Humblot, 1993, p. 53; see also,

⁵⁸ Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 20.

⁵⁹ Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 21.

⁶⁰ Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 21.

⁶¹ Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 22.

⁶² Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 22. Similarly for precedents in p. 23.

Indeed, one of the differences between using formal reasons and being a formalist, according to Atiyah, is openness to the possibility of introducing exceptions to the application of rules. Those qualifications show a certain uneasiness with the conception of legal formality that equates it with the exclusion of certain sorts of reasons from judicial decision-making, an uneasiness that is paradigmatically shown in a passage of Frederick Schauer's *Playing by the Rules* in which he proposes that exclusionary reasons could be conceived as telling an agent

‘to look just quickly, if possible, at the excluded first-order reason to see if this is one of the cases in which the exclusion of that factor should be disregarded, ...’⁶³

Now, as Emiliios Christodoulidis has already pointed out, it is not at all clear how the thesis that formal reasons always exclude other reasons for action could be made compatible with the qualification that sometimes some sorts of reasons (e.g. gross injustice) can defeat the formal reason⁶⁴. This leads to an ambiguity in the conception of formal reasons that is clearly expressed in Atiyah's (apparent) paradox that an exclusionary reason ‘operates rather like a presumption which is sometimes irrebuttable, but sometimes rebuttable.’⁶⁵ The question that must be asked is which sorts of reasons can be put forward in order for the judge (or anyone subject to the law, for that matter) to consider the formal reason in a particular case to be irrebuttable.

Atiyah presents some reasons that he believes would justify the exclusionary conception of legal reasons. One of those reasons concerns the low cost-effectiveness of comprehensive reasoning⁶⁶. This argument by no means exhausts the list of arguments that aim at justifying the exclusion of some reasons from the process of decision-making and, to be sure, Atiyah himself offers other such arguments⁶⁷. However, the argument of cost-effectiveness is a *paradigm* of the sort of argument for exclusion that does not rely on second-order reasons and that makes it suitable to be used as a means to show why arguments of its kind cannot justify the exclusion of reasons from decision-making processes.

⁶³ Schauer, Frederick *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* Oxford: Clarendon Press, 1991, p.91.

⁶⁴ Christodoulidis, Emiliios *The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular* *Law and Philosophy*, Vol. 18, Issue 2, p. 231.

⁶⁵ Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 37.

⁶⁶ Atiyah, P. S. *Form and Substance in Legal Reasoning*, cit., p. 24 ff.

⁶⁷ For an overview of the arguments for the formality of law, see MacCormick, Neil *The Ethics of Legalism* *Ratio Juris*, Vol. 2, Issue 2, p.184-193.

According to the argument of cost-effectiveness, a full investigation on all the relevant reasons for action in any particular case would be way too costly. That cost makes it prohibitive that the public agent effectively uses all reasons that might be in principle applicable to the case. The problem of cost becomes even more serious given the obligation that public agents have of being impartial regarding those who are subject to their authority, for if a judge is to grant a costly investigation to one subject, he would have to do the same to all other subjects in the same situation. However, we must here differentiate between, on the one hand, reasons which are applicable to the case but which are defeated by other reasons also applicable to the case and, on the other hand, the reasons that are simply not applicable to the case. Before I consider whether or not the argument of cost-effectiveness has any bearing on situations in which applicable reasons are weighed against one another, let me deal with the problem of the applicability of a reason. A reason might be proved not to apply to the case when the facts do not allow it. The fact that murder was committed is a good reason to sentence the accused to life in prison *only if* the accused was the one who committed the murder and whether or not this is the case is a matter of investigating *facts*. Factual investigation might be indeed very costly and the argument of cost-effectiveness seems to justify that certain factual investigations not be performed comprehensively.

But can the argument for cost-effectiveness justify that formal reasons exclude other reasons that are *available* to the agent? The argument would only work in those situations if a further argument is provided that proves that weighing already available substantive reasons against each other is significantly more costly than weighing formal reasons against each other. Habermas does indeed provide an argument for that conclusion, but I shall wait until the next chapter, which is mainly dedicated to discourse theoretical arguments for the formality of law, to deal with it.

More interestingly for my purposes here, there is no systematic priority between the need to be cost-effective and moral reasons. Cost-effectiveness in judicial decisions might be granted some moral value if it is backed by good moral reasons for society to have a legal system at all, such as the value of co-ordination of behaviour or more generally the value of security in human affairs. But those reasons are reasons to be weighed against other moral reasons and, as we saw in the third chapter, there can be no systematic priority between first-order moral reasons. This is the sense in which the argument of cost-effectiveness is paradigmatic of the sorts of arguments offered by Atiyah and others for the formal nature of legal rules.

Differently from Raz's normal justification thesis, those arguments are ultimately grounded in first-order moral reasons and, for that reason, they cannot claim systematic priority; and because they cannot claim systematic priority, they cannot justify the systematic exclusion of other moral values, which might themselves defeat them. The 'formality' of law is a result of a number of *good reasons not to reason comprehensively*, but those reasons are themselves *first-order moral reasons* and their nature makes it conceivable that they be sometimes defeated by other moral reasons.

That reading of the formality of law explains why formal reasons operate 'within constraints', that is to say, it explains why there are cases whose solution according to formal reasons is so 'grossly anomalous or utterly absurd or perhaps even seriously unjust' that substantive reasons break through the formality of law in order to influence the decision. In other words, it helps to explain the sense in the apparent paradox that formal reasons are 'sometimes irrebuttable, but sometimes rebuttable'.

Now, is there a reason why one should stick to the exclusionary conception of formal reasons instead of adopting a conception of formal reasons as reasons that are grounded on very important first-order reasons such as, promoting social stability, preventing public agents to decide arbitrarily, or improving co-ordination between the members of society? Christodoulidis presented some reasons why law's formality can only be conceived in an exclusionary fashion. He claims that law is an evolutionary achievement that diminishes social complexity and that accepting that first-order reasons leak into the second-order level of justification would 'undo law as an institutional achievement'⁶⁸. But why would this undoing be problematic? The problem seems to be the fact that without an exclusionary conception of formality, social complexity would once again increase. There is no denying that social complexity will indeed increase. However, there is no reason to believe that a certain level of social disintegration would not be a price worth paying for more goodness in public decision-making. To be sure, if the social disintegration caused by changing our concept of legal formality would be so great as to make social interaction impossible (under conditions of double contingency) that would be a very good reason indeed to stick to our evolutionary achievement of conceiving formality in an exclusionary way. But I see no reason why the very important first-order reasons mentioned above as good grounds for deciding according to the

⁶⁸ Christodoulidis, Emilios *The Irrationality of Merciful Legal Judgement*, cit., p. 235.

law wouldn't be able to guarantee a very high level of social integration. This would leave the space open to other first-order reasons to enter judicial decision-making, as well as the decision-making of law-abiding citizens in general, for the strong first-order reasons they have to stick to the law are, as is any first-order reason, defeasible.

In this conception of formality, formal and substantive reasons are entangled, the formality of formal reasons being guaranteed by strong substantive reasons. That conception of formality is, therefore, highly sensitive to substantive arguments, and that is, perhaps, the next evolutionary achievement of social systems. Indeed, various instances of changes in legal practice bear witness to the increased importance of substantive argument in judicial decision-making. The most striking example is perhaps the growth of the concept of good faith in German case law, notably in the first quarter of the 20th century⁶⁹. The judicial use of the concept has defied all attempts to circumscribe 'good faith' to a strict definition or to reduce it to a *numerus clausus* list of rules. Good faith seems to be simply a door through which weighty substantive considerations came to be used as grounds for the decision of German courts. Contemporary substantive considerations are as much included in 'good faith' as substantive considerations inspired in roman and romanistic law⁷⁰. It has recently been defined as a requirement of fairness in private affairs and, in this conception, good faith is clearly a window within the legal system for considerations of substance in judicial decision-making.

Having pointed out the differences between Christodoulidis's approach to formality and mine, let me just briefly show where they coincide. Both Christodoulidis and I share a preoccupation with the colonisation of the ethical by the legal, of the substantive by the formal. His way out of this colonisation is his understanding of the concept of mercy as a doorway into a more complex world where reflexivity (roughly what I call plenary reasoning) has its space. Mine is to redefine formality so that reflexivity becomes inherent to formal (and amongst them legal) reasons, in a way that actually resembles the old positivist call not to act on legal norms without having good moral reasons backing your action.

⁶⁹ On the evolution of the concept of good faith, see Martins-Costa, Judith *A Boa-fé no Direito Privado: sistema e tópica no processo obrigacional* São Paulo: Ed. Revista dos Tribunais, 1999.

⁷⁰ As, e.g., the clause forbidding the *venire contra factum proprium*. For other sorts of substantive considerations that made their way into German legal decision through the concept of good faith, see Wieacker, Franz *El Principio General de la Buena fe* (translated by Jose Luis de los Mozos) Madrid: Civitas, 1976.

Conclusion

In the present chapter, I analysed the first sort of argument that tries to insulate legal reasons from other sorts of reasons (notably moral reasons) by means of an argument concerning legal authority's legitimacy. I started by differentiating the various modes of authoritative intervention in the subject's actions. Particularly, I differentiated between interfering by means of introducing objective reasons for action and interfering by means of introducing reasons for taking decisions. After establishing that Raz's normal justification thesis aims at introducing not objective reasons for action but simply reasons for decision, I moved on to object to the idea that the normal justification thesis justifies that legal reasons exclude moral reasons by kind from public decision-making. Raz's strategy is particularly interesting because it relies on a logically sound separation between two levels of justification. However, the strategy does not succeed in justifying the exclusion of reasons from judicial decision-making, even if we consider the amendments to Raz's theory of pre-emptive reasons proposed by Soper. Finally, I moved on to consider whether first-order reasons could succeed where the second-order reasons grounded in the normal justification thesis failed. I then show why reasons which are offered in order to ground legal reasons' formality cannot justify any sort of exclusion by kind of other first-order reasons.

In the next chapter, I shall deal with yet another attempt to justify law's formality in terms of absolute exclusion. In this attempt, Habermas again has the concept of legitimacy as the central conceptual tool of his argument, but legitimacy is now defined in terms similar to Kant's concept of public reason, which was introduced in the third chapter.

Chapter Five: The procedural value of legal decision-making and the insulation between legal and moral reasons for action

Legal decision-making may be thought to be morally valuable because it is an essential part of a procedure of decision-making that is *itself* morally valuable. There are different ways in which the procedural value of legal decision-making can be justified, at least one of which requires that legal reasons and other sorts of moral reasons are *insulated* from one another. I have already dealt with two attempts to justify morally the insulation of some practical reasons from practical decision-making. In chapter three, I dealt with the liberal attempt to insulate reasons concerning the right from reasons concerning the good. In chapter four, I dealt with attempts to justify the insulation of reasons derived from authoritatively issued directives from other practical (particularly moral) reasons. In this chapter, I try to rebut yet another attempt to insulate legal reasons from moral reasons, namely, the discourse-theoretical justification for the value of the procedure through which legal reasons are created. These three chapters engage with the project of building an ethics of public decision-making by dealing with perhaps its most delicate general problem, that is, the insulation between reasons. The worth of the project of investigating the moral reasons that apply to decision-making, even if they do not apply directly to action and, in doing so, of building an ethics peculiar to decision-making was justified in the first chapter. The investigation of the role moral rules assign to reasoning in processes of decision-making is a central part of the project. In the second chapter, I concluded that, in the particular case of public decision-making, one is morally justified in holding a prejudice according to which reasoning is always required. Chapters three and four, as well as the present chapter, deal with the problem of *how* to use reasons in decision-making, particularly in public decision-making.

In what follows, I shall identify some of the ways in which procedure can be said to make obedience to the results of legal reasoning morally valuable and identify the one which implies the exclusion by kind of moral reasons from the domain of legal reasoning. Then I shall try to show how that justification of the procedural value of legal reasoning fails to justify such insulation. I begin by presenting three senses in which legal reasoning can be said to have procedural value. I claim that the first two of those three senses do not imply any insulation between legal and moral reasons for the reasons already presented in chapter four. I will try to

show that some versions of the third sense in which legal reasoning is said to be procedurally valuable are also compatible with the thesis that legal reasons are not insulated from moral reasons. That is the case of Alexy's theory of legal argumentation. I have no quarrel with those conceptions of legal reasoning's procedural value. However, another version of the third sense in which legal reasoning is procedurally valuable is not compatible with the thesis of non-insulation, to wit: Habermas's conception of the procedural value of law as presented in *Between Facts and Norms*. With that conception of the procedural value of legal reasoning I do have a problem and I shall present my case against it in the closing part of this chapter.

The Procedural Value of Legal Reasoning

Many different arguments have been put forward in order to justify the claim that there are moral reasons for adopting the result of legal reasoning as a reason for deciding in one way rather than another. Some of those arguments are attempts to justify different versions of the thesis that moral agents must respect certain procedures of decision-making. One of those versions would be, for instance, the one according to which moral weight must be attached to the result of, say, democratically-passed law. Those sorts of reason for moral agents to act according to legal reasons are analogous to the reasons we have to accept the result of other procedures that help us take decisions, such as drawing lots. In some instances, it may be that drawing lots is the best of the available methods for settling the matter. Jon Elster has provided a detailed argument for the suitability of random methods for settling at least some questions concerning child custody¹ and, indeed, the electoral legislation of some contemporary democracies already prescribes the drawing of lots as the method of deciding who should be elected in case of two candidates having an equal number of votes, even if often other criteria, such as age, should take precedence. Before I deal with the two specific arguments put forward by Alexy and Habermas to justify the procedural value of legal reasoning, let me first say something about the ways in which procedures can make actions, states of affairs and reasons for taking decisions morally valuable.

Procedures in general, and decision-making procedures in particular, can relate to moral

¹ Elster, Jon *Solomonic Judgements: Studies in the Limitations of Rationality*, Cambridge: Cambridge University Press, 1989.esp. chapter three.

values in at least two different ways². On the one hand, there may be reasons that justify treating a particular procedure as *constitutive* of the particular value (say justice) to be attached to its result and that would imply, in its turn, that there aren't independent standards to judge the justice of that result. Let me borrow Rawls' expression and call the value to be attached to the results of such procedures 'pure procedural' values. An example of pure procedural value given by Rawls is the justice of the result of gambling: if certain conditions are fulfilled by the procedure (e.g. none of the players cheats, participation is voluntary), the final distribution of the fund is not only necessarily just, but the very criterion for its justice is the players' fidelity to the procedure. On the other hand, there are procedures that can help to inform action and whose adoption is justified by the fact that they help to bring about certain results which are valuable for reasons *independent of the actual procedure* through which they are reached. Rawls' example is once again enlightening. If, in sharing a cake, the desired result is to equally distribute the cake amongst a number of people, the procedure according to which the person in charge of cutting the cake is the last to choose his own share seems to be a good way to guarantee that the desired result will be achieved. But the procedure is not what makes the result just. The justice in the division is a function of the equality of the shares, not of the procedure adopted. The procedure is only valuable and morally recommended as a good (and even, under some assumptions, as a perfect³) means to achieve the valuable result. Sometimes the procedure is a sure way to achieve the desired result and sometimes it only increases the probability of achieving it. Given a number of assumptions (that the person in charge of cutting the cake is able to slice it in approximately equal pieces, that she is interested in maximising her share of the cake, etc), the result achieved by the procedure can be said to be a hundred per cent guaranteed. Nevertheless, attachment to the procedure is not what makes the result right. Whenever the result is guaranteed in this way, Rawls talks about 'perfect procedural justice'. Finally, Rawls uses the expression 'imperfect procedures' for the procedures that only increase the probability of bringing about the right outcome, without

² In what follows, I apply to the relation between decision-making procedures and moral value Rawls's insight about the relation between procedures in general and justice in particular, as in *A Theory of Justice*, Oxford: Oxford University Press, 1971, p. 83 ff.

³ Rawls seems to think that there are two species of derivative procedural justice, namely, 'perfect' and 'imperfect' procedural justice. The latter does not guarantee the desired result, although it is likely to help to bring it about, the former necessarily brings about the desired result, at least under some assumptions. I shall not use the distinction in what follows both because it seems to me to be simply a matter of degree and because what is relevant to the point I want to make is that in both cases there are independent criteria to assess the value of the procedure's result

making it a hundred per cent certain. I shall refer to the value of both perfect and imperfect procedures in respect of their results as '*derivative procedural values*'. Notice that in the distinction between pure, perfect and imperfect procedural value two criteria combine. The first is whether or not procedures are constitutive of the value and, according to this criterion, one differentiates pure procedural value from derivative procedural value (which includes both perfect and imperfect procedures). The second, which only applies to derivative procedural values, is whether or not there is a hundred per cent probability that the procedure brings about valuable states of affairs (or actions, or reasons for action).

Before we move on to give examples of arguments of each kind which were put forward to justify the attribution of moral weight to the conclusion reached by legal reasoning, let me remind the reader of the fundamental difference between the function that a distinction between pure and impure procedural justice has in Rawls' project and compare it with the function of the distinction between pure and impure procedural values in my own project. Rawls' project is fundamentally a constructivist project that aims at providing ways to access the *overall moral value* of states of affairs and actions. The criteria for justice which can either be used in order to evaluate the result reached through the procedure (in the case of derivative procedural justice) or be confused with the application of the procedure (in the case of pure procedural justice) are not criteria to access *one way in which* the result can be said to be valuable. What results (derivatively or originally) from the procedure, is not the attribution of some value to one course of action which can be weighed against other applicable moral values, but a conclusive answer for the problem of what is the right thing to do. The criteria Rawls is talking about are criteria for justice and, Rawls conceives justice as a political theory of the right, which itself always take precedence over the good. That is not to say that there aren't other ways of attributing moral value to the result, since one might still judge the value of a particular result according to different sets of moral values. However, justice (the right) is prior to all those values and offers the ultimate criterion for action for rational and reasonable agents. Some would argue that this goes against Rawls' claim that his doctrine is 'freestanding' and only 'political', as opposed to comprehensive, but the corollary of the priority of the right over the good is precisely that the political should take preference in matters related to the basic structure of society. That doesn't mean that the political cannot be freestanding in Rawls' terms. To say that a political doctrine is freestanding means simply that it can be justified regardless of any specific comprehensive doctrines. But that has no implications for its ambitions of covering a certain area of action with conclusive

considerations. On the contrary, the idea of building a freestanding theory is related to the need for guiding particular choices concerning the basic structure of society in a context in which the wealth of comprehensive doctrines threatens to paralyse the public agent⁴.

My aims in this section are rather more modest. I am not proposing any theory of how to grasp what is the correct course of action in public matters, all things considered. My concern is limited to processes of public decision-making and the justification one can have to adopt the recommendations with which they conclude. The question of which processes of reasoning are able to add value to a particular course of action is not to be confused with the question of what is the morally correct thing to do all things considered. As I hope to have shown earlier in this thesis, there may be very good reasons to decide to do what eventually turns out not to be the best alternative. While Rawls is thinking of how the adoption of certain procedures relates to the correctness of an action *tout court*, I am thinking here of the way certain procedures can lend *any sort of value* to some courses of action. More specifically, I am presenting in this introduction to chapter five *ways* in which procedures can be said to lend *any moral weight* to the course of action they recommend. Specific arguments for the procedural value of legal reasoning as a guide to decision-making fall into one of the three categories delineated above (pure, perfect and imperfect value). The relevance of this classification in the context of this thesis is that there are arguments against the insulation between legal and moral reasons for action that are specific to each of them.

There are three kinds of argument that could be offered in order to justify the attribution of moral value to the result of the process of legal reasoning. According to the first sort of argument, acting on the conclusions of legal reasoning is valuable only because the procedure is likely (but not guaranteed) to produce a result that can be morally judged by criteria which are independent from legal reasoning itself. Those arguments regard legal reasoning as having imperfect procedural value. An instance of this sort of argument would be the arguments that prescribe that judges should always decide according to the law passed by the majority because, although the majority is not free from making mistakes, it is, under certain conditions, more likely to bring about a more tolerant society⁵. According to the second kind,

⁴ Many objections can be offered against Rawls's attempt to ground a separation between the political and the comprehensive doctrines, some of which can be found in the third chapter of this thesis. Here I just point out that there is no contradiction in saying that a political doctrine is freestanding and at the same time prior to all other conceptions of what has moral value.

⁵ Waldron, Jeremy *Law and Disagreement*, Oxford: Clarendon Press, 1999, chapter 7.

the fact that following the recommendations arrived at by means of legal reasoning helps to enforce a particular moral value is due to the fact that the value of the result is brought about by the process of legal reasoning itself. Adopting the conclusions of properly performed legal reasoning as a guide to action is a sufficient condition for attributing to the resulting action the particular moral value used to justify legal reasoning and, for that reason, the resulting action is *always* backed by that particular moral value. This way of conceiving legal reasoning equates it to a 'perfect procedure' in the terminology introduced above. According to both sorts of argument, the procedural value of legal reasoning is only derivative, for it is either a perfect or an expedient means of bringing about states of affairs that are valued independently from the fact that they were brought about by legal reasoning.

Before I introduce the third sort of argument that could be offered in order to justify the attribution of moral value to the result of the process of legal reasoning, let me just call attention to the fact that Raz's 'normal justification thesis' is a general formulation of the conditions under which arguments for the derivative procedural value of adopting legal reasoning's conclusions as guides in judicial decision-making can be successful. Both in perfect and in imperfect procedures, criteria exist independently of the procedure adopted and the procedure is only regarded either as a perfect or as an expedient way of bringing about certain actions/state of affairs. That means that the persuasiveness of arguments of either perfect or imperfect procedural values is a function of the *likelihood* of bringing those actions/states of affairs about. All sorts of justification for the derivative procedural value of legal reasoning suppose, therefore, what we might call the *principle of likelihood* according to which 'accepting the result of procedures as a guide to action is justified if the adoption of the procedure is likely to bring about a morally valuable action'. The analogy between the principle of likelihood and Raz's normal justification thesis is striking. Remember that according to Raz's normal justification thesis,

[t]he normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons that apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly'⁶

⁶ Raz, J. Authority, Law and Morality in Raz J. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, p.214.

The normal justification thesis is effectively another formulation of the principle of likelihood that grounds arguments of derivative procedural values. I expect to have shown in chapter four that, although essentially sound, such a strategy for justifying the adoption of the conclusions of legal reasoning as a guide to decision-making cannot justify the insulation of legal reasons from moral reasons.

The third kind of argument for the procedural value of legal reasoning attempts to prove that acting on legal reasons brings about *pure procedural value*. According to this thesis, there are values whose respect necessarily depends on the agent abiding by the conclusion of legal reasoning or, what is to say the same, acting on the conclusions of legal reasoning is not only a sufficient but also a necessary condition for the attribution of the particular moral value to the resulting action. And the reason for that is that law and legal reasoning are not only a necessary condition, but also a *conditio per quam* (the factor through which) the action according to the recommendation arrived at by the process of legal reasoning is valuable. Legal reasoning is then conceived as a 'pure procedure', in the sense explained above: there aren't independent standards to judge the result arrived at by legal reasoning. What makes the judicial decision right is the fact that it follows from legal reasoning.

In itself, conceiving legal reasoning as having pure procedural value does not imply an insulation between legal and moral reasons, but certain versions of theories of legal reasoning's pure procedural value do indeed have just such an upshot. I shall be analysing in what follows two arguments that attempt to justify the thesis according to which legal reasoning has pure procedural value, to wit: Alexy's theory of legal argumentation and Habermas's conception of the relation between democracy, morals and political action as put forward in *Between Facts and Norms*. In the next section, under 'a', I claim that the former does not imply that legal reasons are insulated from moral reasons in judicial decision-making. The latter, however, implies just such an insulation, and I shall present my objections to the argument's use to achieve that aim under 'b', in the next section.

Discourse Theory and the Procedural Value of Legal Theory

I believe that the claim of insulation made by Habermas and analysed below is not implied by discourse theory's most central (and most widely shared) theses. In order to show precisely that, I shall start my analysis of discourse theory's arguments concerning the value of legal reasoning by showing how no insulation between legal and moral reasons would follow from

Alexy's version of discourse theory as presented in his *A Theory of Legal Argumentation*. We shall then move on to deal with Habermas's justification of the insulation between legal and moral reasons as put forward in his *Between Facts and Norms*. I will try to show that there is an analogy between Habermas' argumentative strategy and the argumentative strategy underlying some liberal arguments analysed in chapter three used to separate the right from the good (those that I named in the third chapter *the internal connection argument*, *the objectivity argument* and *the argument of reason's authority*)⁷. As in those liberal arguments, Habermas's insulation is obtained by means of introducing in the justification of the reasoning process *an order of value which is neither 'moral' nor 'legal'*. By using that argumentative strategy Habermas argument would seem to be immune to what we called in chapter three 'the argument of importance'. What makes these attempts to insulate legal from moral reasons impervious to the argument of importance is the fact that, because the reason that institutes the separation is of a different kind, it cannot be weighed against, and therefore it can be defeated neither by moral reasons nor by legal reasons. I will finally try to show that ultimately a justification for this third-order of value is missing and that, as a consequence, Habermas's argument is insufficient to justify an insulation between legal and moral reasons.

a) About whether or not Alexy's conception of legal reasoning as a pure procedure implies the insulation of legal reasons from moral reasons

Let me start by considering how Alexy explains the procedural value that ensues from legal reasoning so as to grasp the picture of the interaction between legal and moral reasons that follows from it. In order to reconstruct his argument, I shall introduce in what follows some arguments and presuppositions that, although not explicit in Alexy's *A Theory of Legal Argumentation*, help to make sense of discourse theory. Alexy's argument starts off from the general premise of discourse theory according to which the only feasible way to justify normative claims is by reference to certain rules whose validity 'is a condition of the possibility of linguistic communication.'⁸ In a 'postmetaphysical age', when neither a conception of the person nor a philosophy of history are available for the purpose of

⁷ That notwithstanding the major differences between liberal political philosophies and Habermas's own political philosophy. Some of those differences are presented by Habermas himself in *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism* *Journal of Philosophy*, Vol. XCII, n.3 (1995), pp. 109-131.

vindicating morality, moral imperatives can only come from 'within'⁹. Discourse theory takes the only available conception of 'internality' to be the internality of communicative action. But Alexy also believes that there is a limit to what this justificatory strategy can vindicate in terms of practical rules. While they would be clearly able to justify some practical rules, as for instance the rule that prohibits slavery¹⁰, there would still be a significant number of rules which are neither compulsory nor prohibited by those rules presupposed in linguistic communication. This zone of 'discursive possibility',

in its turn can be the subject of practical discourse. In such discourses, rules are justified which make it possible to decide between two incompatible and discursively possible solutions. Examples of such rules are the rules of parliamentary legislation based on the principle of representation and the majority principle. Rules such as these, as well as those legal rules established by procedures governed by them, are necessary and to this extent reasonable, because there are limits to the possibility of arriving at compelling solutions in practical discourse. The limits of general practical discourse provide justifying grounds for the necessity of legal rules. This brings about the transition into legal discourse¹¹.

In this passage Alexy makes clear that he believes that the necessity for a legal discourse arises precisely from general practical discourse's¹² inherent incompleteness. Legal discourse arises, as it were, in the interstices of moral discourse. The moral value of the legal procedure of decision-making is brought about, at least in part, by the fact that there are cases to which no moral value directly applies.

It follows that the relation between, on the one hand, general practical discourse and morality and, on the other hand, legality and legal reasoning is both *functional* and, to the extent that function is morally important, *normative*¹³. Law and legal reasoning have the function of helping moral agents to cope with the uncertainty of general practical discourse. At the same time, general practical discourse justifies law and legal reasoning because it is possible to derive from general practical discourse that there is value in this function being fulfilled, at

⁸ Alexy, Robert *A Theory of Legal Argumentation* (Translated by Ruth Adler and Neil MacCormick), Oxford: Clarendon Press, 1989, p.185.

⁹ This profession of faith to the Kantian critical project is found explicitly in Habermas, Jürgen *Between Facts and Norms* (Translated by William Rehg), Cambridge: Polity Press, 1996, p. 100-106.

¹⁰ Alexy, R. *A Theory of Legal Argumentation*, cit., p. 207.

¹¹ Alexy, R. *A Theory of Legal Argumentation*, cit., p.207-8.

¹² Alexy seems to use interchangeably 'general practical discourse' and 'moral discourse'

¹³ Klaus Günther *Critical Remarks on Robert Alexy's 'Special-Case Thesis'* *Ratio Juris*, Vol. 6, Issue 2, p. 145

least under the conditions of a limited time-span to resolve pressing practical problems and given the tentative nature of general practical discourse's conclusions¹⁴. Presumably, in justifying law and legal discourse, general practical discourse sets substantive constraints for law and legal reasoning. If that were not the case, a Hobbesian Leviathan would suffice to narrow down the scope of discursive possibility and, as a result, to help us cope with the inherent incompleteness of general practical discourse and the uncertainty that it produces¹⁵. Those substantive constraints are the grounds from which Alexy derives the particular formal constraints that make law and legal reasoning able to reduce uncertainty, notably the limitation of departure points for legal reasoning (to a body of legislation, or precedents or the like). If legal reasoning were not subject to those formal constraints, it would not be able to reduce uncertainty and it, consequently, would not be justified by its function. Legal discourse differs from general practical discourse precisely because it operates under those constraints that are ingrained in general practical discourse.

As we saw above, the presuppositions of general practical discourse are the source of Alexy's argument for what constitute moral correctness. Can the same be said about legal reasoning? Can we derive from the presuppositions of legal discourse any criterion of correctness whatsoever? Alexy believes that legal norms 'claim' correctness¹⁶. But this correctness has a limited scope, for it is only legal correctness, but not correctness *tout court*. If legal correctness is correctness only in a qualified sense, can it be enough to grant unconditional justification for an action? It would seem that it does not, for Alexy himself believes that:

The claim to correctness involved in legal discourses is clearly distinguishable from that involved in general practical discourses. There is no claim that the normative statement asserted, proposed, or pronounced in judgements is absolutely rational, but only a claim that it can be rationally justified within the framework of the prevailing legal order.¹⁷

Because it does not claim to be 'absolutely rational', legal discourse cannot demand obedience

¹⁴ Alexy, R. *A Theory of Legal Argumentation*, cit., p. 19 See also Alexy, R. *On Necessary Relations Between Law and Morality* *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*, Vol. 2 Issue 2, p.181.

¹⁵ This argument for Alexy's need to defend a justificatory relation between legal argumentation and general practical discourse was put forward by Klaus Günther (*Critical Remarks on Robert Alexy's 'Special-Case Thesis'*, cit., p. 145).

¹⁶ The claim to correctness is one of the three grounds for Alexy's Special Case thesis according to which legal discourse is a special case of general practical discourse. See *A Theory of Legal Argumentation*, cit., p. 212-13.

¹⁷ Alexy, *A Theory of Legal Argumentation*, cit., p.214.

from within. This is in accord with Alexy's more recent account of the claim to correctness. According to this account the claim to correctness comprises two separate elements:

The first aspect is the claim that the decision is correctly substantiated if one presupposes the established law whatever it may be. The second aspect is the claim that the established law on which the decision is based is just and reasonable. Both aspects are contained in the claim to correctness raised in judicial decisions. Judicial decisions not only claim to be correct *within the framework of the validly established legal order* but also to be correct *as legal decisions*¹⁸.

For there to be an obligation to obey legal norms, certain conditions must obtain and those conditions must be external to legal discourse. The truth of Alexy's thesis that the claim that the legislation on which the decision is based is rational is part of legal discourse does not change the fact that the criteria for judging the rationality of legislation is not to be found within law. If an explanation of the conditions under which legal validity is a good reason to justify action cannot be provided, it follows that legal discussions, contrary to what Alexy believes, would not concern practical questions at all. If those further conditions do not obtain, whatever role normative words (should, etc.) would be playing in legal discourse, it would not be the role of justifying an action. If legal discourse is, as Alexy claims, a special case of practical discourse, an explanation of the conditions that must be fulfilled for legal discussions to have a justified claim to guide action has to be provided. And this explanation can only come from the presuppositions of general practical discourse, for only those have a claim to be absolutely rational.

If my interpretation of Alexy's theory is correct, how should we explain the author's explicit denial that the special-case thesis is a 'subordination thesis', in favour of the conception of the special case thesis as an 'integration thesis'?¹⁹ On my interpretation, wouldn't the norms justified by legal discourse be subordinated to the norms that can be deduced from general practical discourse?

I think not, or at least not necessarily. Law and legal reasoning are not subordinate in the sense of *always* being absolutely separate from and secondary to morals and general practical discourse. Law and legal reasoning are *a part of morals* in the sense that, in zones of discursive possibility, law enacted according to rational criteria and legal reasoning performed

¹⁸ Alexy, Robert The Special Case Thesis *Ratio Juris*, Vol. 12 Issue 4, p. 381.

according to rational criteria have authority to determine what is discursively right to do, *all things considered*. In the terminology introduced in the earlier part of this chapter, parliamentary legislation based on the principle of representation, the majority rule and legal reasoning are procedures that bring about, at least within the zone of discursive possibility, *pure procedural moral value*. In other words, they constitute the moral value applicable to the situation when no other moral value applies. That is one way of understanding what Alexy means when he says that the special-case thesis is an 'integration' thesis, as opposed to a subordination thesis.

However, in order to provide an answer to the problem that must concern us regarding Alexy's theory of legal argumentation, which is whether or not it implies an insulation between legal and moral reasons for action, we have to investigate how 'integration' could be achieved in cases in which the products of legal reasoning conflict with the solution to be found in the zones of discursive necessity and impossibility. My central concern is to investigate what the truth of the thesis that the bindingness of *legislation* and of *legal decision-making* is conditioned to the fact that the norms and decisions produced by the procedures do not go against norms which are discursively necessary or impossible would imply to the problem of whether or not legal reasons are insulated from moral reasons.

If an argument is provided that justifies the adoption of the results of a legislative procedure as norms to guide public agent's (notably judge's) decision-making *only to the extent* that they do respect the norms which are discursively necessary and discursively impossible, there would be no insulation between legal and moral reasons in processes of public decision-making. Judges would have to decide on moral reasons whether or not the case at hand would be within the moral 'competence' of representative legislative bodies and courts. If the particular case does not fall within the realm of discursive possibility, it would follow that the reasons to be applied are not those reasons that spring from the pure procedure of legislation and legal reasoning, but the moral reasons that are *directly* relevant to the case, including certain moral reasons one might have to decide according to an unjust law, such as, for instance, the need to respect the separation of political powers. If that thesis is correct, the procedural value of legislation and legal reasoning in cases for which general practical discourse *has answers* would not necessarily be only *pure procedural value*. It could also be

¹⁹ Alexy, *A Theory of Legal Argumentation*, cit., p.19-20. A more recent and more complete

derivative procedural value (whether perfect or imperfect) as when strict respect for democratically passed law helps to bring about toleration. Respect for democratically passed law can still constitute formal values such as the separation of powers in the state and legal certainty and, to that extent, it still brings about pure procedural value. However, formal values are only values because they are justified as means to bring about substantive value and there seems to be no reason to believe that the relation between formal and substantive values is necessarily conceptual. In those cases in which legal reasoning brings about *derivative procedural value*, the general argument against the possibility of arguments of such nature being able to insulate legal from moral reasons (which I presented in the fourth chapter as an objection to Raz's normal justification thesis) applies. Otherwise there is a need to provide two arguments in order to prove that any insulation between legal reasons and moral reasons follows: a) an argument for the conceptual (rather than empirical) connection between those formal values and a (or some) substantive value(s) and b) an argument for the systematic priority of those substantive values over all other substantive values. Arguments for systematic priority fail for the reasons presented in the first section of the third chapter. That should be enough to conclude that the theory of law that justifies the adoption of the result of a legislative procedure as norms to guide public agents' (notably judges') decision-making *only to the extent* that they do respect the norms which are discursively necessary and discursively impossible cannot justify the insulation between legal and moral reasons.

If, on the other hand, an argument is provided that justifies the adoption of the results of a legislative procedure as norms to guide judicial decision-making, regardless of whether or not those rules contradict the areas of discursive necessity and impossibility, then an insulation between legal and moral reasons would follow. From what we have seen of the argument so far, there seems to be no reason why the agent wouldn't be allowed to consider whether or not the particular legal reason demands something that is forbidden by the hard core of moral reasons provided by general practical discourse. There is a need, therefore, to provide an argument for the thesis that certain sorts of reasons are not available to judges.

One condition for this thesis to be justified is that the reasons on which it is grounded (say, moral certainty under non-ideal conditions) are systematically prior to any other reasons that we can find in the zones of discursive necessity and impossibility. The argument against

statement of this opinion is to be found in Alexy, Robert The Special Case Thesis, cit., p.380 ff.

systematic priority presented in chapter three would then apply. I refer the reader to the end of chapter three's first section for a complete version of that argument. I wish now to try to envisage the way in which, within the framework of Alexy's theory, systematic priority between, on the one hand, reasons that ground the necessity for parliamentary legislation, majority rule and legal reasoning and, on the other hand, other moral reasons also to be found in the areas of discursive necessity or impossibility, might be said to be justified.²⁰

One way to justify the insulation between legal and moral reasons within the scope of Alexy's theory is to put forward a particular conception of the moral division of labour between public agents and the society at large. On that conception, the assessment of a particular decision's correctness is split up in two different moments, one in which the limits of morals are decided and the other when a decision is taken within the space of legal autonomy. One must bear in mind the fact that it follows from Alexy's theory that legal reasons, when not conflicting with moral reasons, *have a claim to guide action by themselves*. This claim itself stems from the moral reason that law helps to increase moral certainty. Now, if there is a set of cases in which legal reasons have a claim ultimately to guide individuals' actions, and if it is true that the decision about which cases are to be included in this set is dependent on a moral norm that can be deduced from general practical discourse, the question that must be answered is who has the competence to decide where morality ends and where legality becomes autonomous? That is not a competence to decide on reasons for and against a particular decision but competence to decide on reasons for and against the inclusion of a particular case in the area covered by the hard core of morality and, as a consequence, for and against considering the case to be within the scope of legal autonomy.

According to one particular conception of the moral division of labour between individuals, society and public agents, the decision about the scope of morality should be excluded from the attributions of at least one particular sort of public agent, namely, judicial authorities. Practical reasoning would then be strictly divided into two parts (the decision about the moral limits of law, and the reasoning about what to do in a particular case) one of which is precluded from judicial reasoning. From this conception of the moral division of labour, it would follow that reasons for action that fall within the competence of the judiciary (or reasons that can be logically implied from them) cannot reopen the discussion about the limits

²⁰ Alexy himself, as we shall see in what follows, would probably disallow those arguments, but what

of law, since that is not part of the competence of the judiciary. It is as if the different moments of a process of practical reasoning needed to be organised in a particular order and the results of the later stages could not be fed back as relevant elements to the earlier moments. If that were the case, the reasoning of at least one particular sort of public agent (judges) would not be comprehensive. The question that remains is which sorts of arguments could be adduced for such a conception of the moral division of labour.

Now, before we go any further, let me just make clear that, according to Alexy, there may be reasons to act on legal reasons that are unjust. Alexy has said, for instance, that compliance with unjust law could be grounded on 'formal principles like those of legal certainty and the separation of powers'²¹. Those formal principles are themselves derived from general practical discourse, as are all reasons for having institutions that help to cope with the problem of uncertainty in general practical discourse²². Can a total insulation between legal and moral reasons be justified within such framework?

One argument to justify insulation might run along the following lines: law and legal reasoning serve the value of reaching moral certainty about the right course of action before acting. Certainty is likely better to be achieved by more widespread and less constrained speech exchanges than by lone individuals' reasonings²³. Therefore, decision-making processes in which participation is more widespread and less constrained (like democratic procedures) are a better way to decide what limits morality imposes to law than judicial procedures. That argument would have to explain why majorities would be necessarily more likely to get it right when deciding about the space of legal autonomy than any particular judge to which the preclusion of considerations of scope is supposed to be applicable. I find it difficult to provide any *conceptual argument* for this being so, for the likelihood of getting the moral answer right seem to be contingent on the majorities and on the judges involved. However I shall assume that it is possible to provide such justification for the sake of the argument.

The reason why it would seem that the argument against systematic priority does not apply

interests me is to show the kind of argument that could be.

²¹ Alexy, R *On Necessary Relations Between Law and Morality*, cit., p.181.

²² Alexy, *A Theory of Legal Argumentation*, cit., p. 207-8.

²³ Even if this premise is correct, which I accept for the sake of the argument, it is not clear that this likelihood cannot be undermined by other considerations in particular cases. I just take it to be part of the best justification for the insulation between legal and moral reasons within the framework of Alexy's thesis.

here is the fact that 'certainty' itself is a value of an entirely different kind. Certainty is an epistemological value that relates to the grounds for believing in the truth of a statement. Now, epistemological values are values of a *different nature* than moral values, and because they have different natures they cannot be compared. The argument of importance was based on the idea that when two reasons are weighed against one another particular circumstances might alter their relative weights and, consequently, those circumstances could alter the balance of reasons. But now it turns out that the value of certainty is not comparable to moral values and that would seem to make the argument of importance (which excludes the possibility of systematic priority) not applicable in situations of conflict between moral certainty and moral values.

This argument recalls one of the liberal arguments for the insulation of the right from the good with which I dealt in chapter three. The same objection that applies to that argument also applies to this argument: even if certainty is not a moral value, 'achieving moral certainty before deciding' *is a moral value* to which different weights can be assigned in different circumstances. As a moral value, there is no reason to believe that it should be immune to the argument against systematic priority put forward in chapter three, and one might safely conclude that other moral values might outweigh it in particular circumstances. It might be that, for instance, achieving moral certainty is not cost effective in particular circumstances. Think of the case in which it is not clear what the majority would think in a particular case, but in which there are also good reasons for the judge to think that a particular decision which must be urgently taken is appropriate. It would seem that the transactional costs of consulting the majority could, at least in those circumstances, outweigh the need for more certainty.

Here I must stress, in order to avoid misunderstanding, that there may be excellent moral reasons not to enforce one's own conception of the good and bow to the majority, but all those reasons would be *moral considerations* about precisely the problem of the autonomy of legal reasons. I happen to believe, although I cannot go into the justification for this belief here, that tolerance is a good reason for judges not to use their power in order to enforce some of their moral values, but I also believe that the only reason why this would be a rational form of decision-making is the fact that tolerance is (and must be) one of the substantive moral beliefs they hold. It does not exclude other reasons by type, but by outweighing them.

If I am correct and a good justification cannot be provided for the moral division of labour that excludes from judges' moral competence the entitlement to reason about the scope of

law's autonomy, Alexy's conception of legal reasoning as bringing about pure procedural value cannot lead to an insulation between legal and moral reasons in public agents', notably judges', reasoning processes. Habermas recently expressed much the same view. When criticising the merging of all levels of practical reasoning in Alexy's conception of a 'general practical discourse', he said that

[o]nce the judge is allowed to move in the unrestrained space of reasons that such a 'general practical discourse' offers, a 'red line' that marks the division of powers between courts and legislation becomes blurred. In view of the application of a particular statute, legislators either in fact put forward or at least could have mobilised for the parliamentary justification of that norm. The judge, and the judiciary in general, would otherwise gain or appropriate a problematic independence from those bodies and procedures that provide the only guarantee for democratic legitimacy.²⁴

Alexy's 'general practical discourse' does indeed comprehend all sorts of practical considerations that can have a bearing on what is the required course of action, including pragmatic (means-end), ethical-political and moral universalizable reasons. Habermas believes that, without separating out those different levels of discourse, it is impossible to justify the insulation of moral reasons from judicial reasoning process. In *Between Facts and Norms*, Habermas tries to offer another conception of moral discourse which aims at justifying why moral reasons do not, at the end of the day, have any bearing on how legal reasons are to be applied by public agents, so as to justify 'the desired separation of powers'²⁵. I turn to Habermas's argument in *Between Facts and Norms* next.

b) Habermas and the co-originality of law and morals

There is one interpretation of Habermas's argument for the procedural value of law, as it was presented in *Between Facts and Norms*, which implies that legal reasons are systematically prior to moral reasons. On this interpretation, which the author himself seems sometimes to favour, the value of legal norms is *constituted* by the procedure through which they are brought about. That is, the value of abiding by legal norms is a form of *pure procedural value*, as defined above. I shall argue in the present section that Habermas's theory, read according to that interpretation, is true *only if* a very demanding empirical claim about the legislative process is proven to be true. No argument is offered by Habermas to ground this

²⁴ Habermas Jürgen *A Short Reply Ratio Juris*, Vol. 12 Issue 4, p.447.

²⁵ Habermas Jürgen *A Short Reply*, cit., p.447.

empirical claim and indeed the difficulty in offering evidence for that claim appears to be overwhelming.

On the interpretation I shall start presenting now, it would seem that Habermas's theory of the legitimacy of law implies that legal reasons do indeed have systematic priority over moral reasons, at least within the domain of formal social interaction. And Habermas seems to be hinting precisely at that when he suggests a division of labour between legal and moral reasons according to which '[t]he principle of morality regulates informal and simple face-to-face interactions; the principle of democracy regulates relations among legal persons who understand themselves as bearers of rights.'²⁶ That means that any authentic interpretation of Habermas's argument for the procedural value of law would have to ground the sovereignty of legal reasons in formal contexts. The interpretation I put forward below is the one I believe is more likely to be able to justify Habermas's claims of insulation between moral reasons and legal reasons. Since the central concern of the present chapter is not so much to establish what Habermas thinks on the subject, but rather to assess arguments that could justify an insulation between legal and moral reasons by means of justifying procedures of decision-making, I shall concentrate in what follows on the interpretation that is more likely to be able to ground insulation. However, Habermas's conception of the relationship between legal and moral reasons is rather complex and, for that reason, before the interpretation of his argument in which I am interested is fully spelled out, I shall briefly introduce some aspects of it.

In *Between Facts and Norms*, Habermas puts forward a model of such relationship in which legality and morality intersect in a number of different ways. Moral reasons are, on one level,

²⁶ Habermas, Jürgen *Between Facts and Norms*, cit., p. 233. See also page 112, where Habermas writes that '[m]oral norms regulate interpersonal relationships and conflicts between natural persons who are supposed to recognise one another both as members of a concrete community and as irreplaceable individuals. Such norms are addressed to persons who are individuated through their life histories. By contrast, legal norms regulate interpersonal relationships and conflicts between actors who recognise one another as consociates in an abstract community first produced by legal norms themselves.' That poses a problem concerning the overlapping of the two ways to address a particular person in particular situations, for it would still not be clear why formal and informal types of social interaction cannot *have a hold* on the same action. It is not obviously false to say that a judge does not cease to be related informally (at the very least as another human being) to someone whose destiny he is called to decide upon in the exercise of his formal role. One might then need criteria to adjudicate between them, criteria that the discourse principle, as formulated by Habermas, *cannot* provide. Indeed, Habermas himself accepts that the discourse principle is absolutely neutral between morality and legality (idem, p.). I shall not pursue the matter here for the simple reason that, as I will try to prove in what follows, the insulation that gives rise to the problem is not itself justified.

an essential part of the lawmaking procedure, if law is to be legitimate. Indeed, *within the legislative procedure* moral reasons have systematic priority over all other sorts of reasons that can ground the enactment of particular norms, namely, pragmatic reasons, ethical-political reasons, and reasons resulting from fair processes of bargaining²⁷. In this respect, the legitimacy of law can be said to depend on its justice, for legitimate legal reasons presuppose the existence of moral reasons²⁸.

On another level, however, legal and moral reasons are said to be co-original. Moral reasons derive from the specification of the discourse principle for those norms that can be justified only through universalization, while the principle of democracy, from which legal reasons spring, derives from the specification of the discourse principle for those norms appearing in legal form²⁹. In *Between Facts and Norms* Habermas writes that

The rational discourse presupposed by the discourse principle [...] branches out, on the one side into moral argumentation, on the other into political and legal discourses that are institutionalised in legal form and include moral questions only in regard to legal norms.³⁰

This bifurcation of the discourse principle is what makes it possible to establish ordered separation between legality and morality. Law and morality are independently derived from the discourse principle to govern different forms of social interaction. However, although law and morality are said to apply to different contexts, Habermas makes it clear that they both refer to the *same kinds of problem*, that is, problems of action-coordination under justified norms and problems of consensual conflict-resolution³¹. The question that might be asked then is why is there any need for a duplication of discourse principles (and of the resulting systems of reasons) if both resulting systems refer to the same sorts of question? In other words, why do we need two different systems of action-coordination and conflict-resolution, one composed by norms which are in accordance with the moral principle and one which is composed by norms resulting from a legislative process that respects the principle of democracy? To the thesis that there is a need for those two different ways to deal with the same problems, Habermas only offers a 'functional' answer but not a 'normative justification'. In Habermas's words, the explanation he offers

²⁷ Habermas, Jürgen *Between Facts and Norms*, cit., p. 166-7.

²⁸ Habermas, Jürgen *Between Facts and Norms*, cit., p. 110.

²⁹ Habermas, Jürgen *Between Facts and Norms*, cit., p. 108.

³⁰ Habermas, Jürgen *Between Facts and Norms*, cit., p. 233-4.

is part of a functional explanation and not a normative justification of law. The legal form is in no way a principle one could 'justify', either epistemically or normatively.³²

Habermas functional explanation begins with a diagnosis of the deficiencies of postconventional morality. All those deficiencies are somehow connected to the thesis that postconventional morality is simply a system of *culture* (symbols), but not a system of *action*. The functional relation between legality and morality is better clarified through the understanding of the sorts of special burdens hanging over moral agents in postconventional societies. First, postconventional morality provides only a *procedure* for judging disputed questions, but no straightforward answers. Subjects are expected to form their own judgements³³ and, for that reason, problems of justification and application in complex issues often overtax the individual's analytical capacity.³⁴

Law comes to help the overburdened agent.

'This cognitive indeterminacy is absorbed by the facticity of the genesis of law. The political legislature decides which norms count as law, and the courts settle contests of interpretation over the application of valid but interpretable norms in a manner at once judicious and definitive for all sides.'... 'Parliamentary legislative procedures, judicial decision-making, and the doctrinal jurisprudence that precisely defines rules and systematises decisions represent different ways that law complements morality by relieving the individual of the cognitive burdens of forming her own moral judgements.'³⁵

Law has, therefore, the power to release the agent from some obligations which, Habermas claims, are implicit in discourse, notably the obligation to engage in reasoning whenever called to justify an opinion. But this is not the only way in which morality helps agents living under postconventional morality.

Postconventional morality brings yet another two burdens to the individual: first, it 'encumbers the individual not only with the problem of deciding action conflicts but also with expectations (*Erwartungen*) regarding her strength of will.'³⁶ Secondly, postconventional morality brings about a problem concerning 'the imputability of obligations, or

³¹ Habermas, Jürgen *Between Facts and Norms*, cit., p. 106.

³² Habermas, J. *Between Facts and Norms*, cit., p. 111-12.

³³ Habermas, J. *Between Facts and Norms*, cit., p. 114.

³⁴ Habermas, J. *Between Facts and Norms*, cit., p. 115.

³⁵ Habermas, J. *Between Facts and Norms*, cit., p. 115.

³⁶ Habermas, J. *Between Facts and Norms*, cit., p. 115.

accountability'. This problem arises especially in regard to positive duties, which often – and increasingly so, as a society becomes more complex – require cooperation or organisation.³⁷ Habermas believes that law also helps the moral subjects to cope with those two further problems by, on the one hand, reinforcing the agent's motivation through threats of coercion and, on the other hand, creating simple criteria for the attribution of responsibilities for the failure in tackling those problems that can only be handled through very complex forms of joint effort like, for instance, the problem of how to eliminate starvation in the third world.

Law's *function* is to relieve the moral agent from all those burdens. Habermas believes that reference to the reasons *legitimately* produced by institutions which are *legitimately* set up by members of an association everyone has joined voluntarily is enough to solve the problems concerning certainty and motivation which are typical of postconventional societies. Reasons created by institutions would take the place of moral and ethical reasons in guiding the agent's *decision-making* (at least in formal contexts). The agent is then alienated from her own *decision-making* which is now taken over by institutions. It would seem that public autonomy is introduced at the expense of private autonomy.

This alienation needs to be justified for the functional connection between law and morality to be of any help in explaining the *bindingness* of norms that appear in the legal form. It is not yet clear why postconventional morality would necessarily imply any of the burdens introduced above and why parliamentary procedure would be less burdened. That I have to follow a procedure in order to be certain is not itself an insurmountable obstacle either to learn what is correct, or to learn who to blame for an incorrect action (the first and the third burdens above). It would seem that the motivational burden will also be relieved if all agents were individually disposed to follow the procedure. There must be more to this functional explanation than that, if it is to ground the bindingness of law and its priority in relation to the agent's moral beliefs. The norms derived from the legal form must have an advantage in relation to the norms any moral agent could derive from the postconventional moral procedure which is available to her. And indeed Habermas is not insensitive to this problem. He explicitly admits that '[t]he law receives its full normative sense neither through the legal form per se, nor through an a priori moral *content*, but through a procedure of lawmaking that

³⁷ Habermas, J. *Between Facts and Norms*, cit., p.116.

begets legitimacy.³⁸ The key to understanding Habermas's conception of the pure procedural value of law lies in the study of the conditions that must be fulfilled for the lawmaking procedure to be legitimate and, as a result of this legitimation, binding. In other words, Habermas's theory of law's legitimacy is introduced as a means to explain how public autonomy can be compatible with private autonomy. By studying the conditions for the legitimacy of legal norms, we shall be able to understand whether or not Habermas's conception of the pure procedural value of law is enough to justify that legal reasons be systematically prior to moral reasons, even if that priority were limited to contexts of formal social interaction.

Habermas believes that law's legitimacy is conditioned by the system of rights and the lawmaking process demanded by the principle of democracy. Those conditions simply regulate access to the process of decision-making. But those are not the only necessary conditions for law's legitimacy: law's legitimacy is also conditioned by the 'legitimacy of the political order and the legitimation of the exercise of political power'³⁹, that is, by *the way* the entitlements which are part of the system of rights are guaranteed within the political community. But why are all those entitlements to participate in the legislative process (in Habermas's terms, in the public will-formation) enough to justify that the result of the process has a better claim to guide the moral agent's action than moral reasons themselves? The answer to that question lies in Habermas's conception of *communicative power*.

In a nutshell, Habermas's argument is that the source of all political power is *communicative power* and that law derives its authority from the fact that it works as a medium through which 'communicative power is translated into administrative power'⁴⁰. In order to present the concept of communicative action, Habermas draws on Hannah Arendt, according to whom communicative power springs from 'communication aimed at reaching understanding'⁴¹. In Habermas's reading of Arendt, communicative power is closely related to the idea of an unhindered public argumentation in which all reasons for action are measured only against other reasons for action, so that factors other than the strength of each reason (such as social

³⁸ Habermas, J. *Between Facts and Norms*, cit., p.135.

³⁹ Habermas, J. *Between Facts and Norms*, cit., p.132.

⁴⁰ Habermas, J. *Between Facts and Norms*, cit., p.150.

⁴¹ Also following Arendt, Habermas introduces the conceptual difference between Power (*Macht*) and violence (*Gewalt*) and identifies communicative power with the former, see *Between Facts and Norms*, cit., p. 148.

power⁴²) would have no bearing on the conclusions about which reason is best suited to guide action. But why would this communicative power be ultimately the *only* source of legitimate legislation and, through legislation, of legitimate political power?⁴³ Although it is not explicitly presented in *Between Facts and Norms*, it is not difficult to infer from Habermas's previous work that the reason why accordance with communicative power is the measure of the legitimacy of legislation is the fact that, for Habermas, *communicative power*, from which the power of legislation stems, is *ultimately the power of reason*. In *The Theory of Communicative Action*, Habermas was explicit about the source of legislation: '[a]lthough construed as power, legislation ... issues not from political will, but *rational agreement*.' (my italics)⁴⁴

I believe that the concept of 'unhindered communication' in Habermas's theory is functionally equivalent to the concept of 'public reason' in Kant's thought⁴⁵. In either case, good reasons spring from an ongoing rational debate where the best reasons are those that survive the criticism from other reasons. More importantly, 'communicative power' and 'public reason' are second-order norms (or principles, as discourse theorists would more naturally refer to them) that explain the authority of some reasons for action (norms) over other reasons for action (norms). The idea that communicative power is the source of all power is not so much a substantive moral idea as it is a structural principle of practical reasoning. The introduction of this second level of argumentation in which the *correctness of actions* is only settled as a by-product of settling the *acceptability of reasons* by means of the application of a second-

⁴² Social Power, according to Habermas is 'the factual strength of privileged interests to assert themselves', *Between Facts and Norms*, cit., p. 151.

⁴³ Habermas claims that the legitimacy of administrative power comes simply from the fact that it is exercised according to legitimate law. See *Between Facts and Norms*, cit., p. 169.

⁴⁴ *apud* Christodoulidis, Emilios *Law and Reflexive Politics* Dordrecht: Kluwer Academic Publishers, 1998, p. 25.

⁴⁵ For a more complete account of the analogy (and disanalogies) between Kant's conception of public reason and Habermas's 'communicative power' see Chambers, Simone *Discourse and Democratic Practices* in White, Stephen K. *The Cambridge Companion to Habermas* Cambridge: Cambridge University Press, 1995, pp. 235 ff. Although the comparison is helpful, Chamber's understanding of Kant's public reason differs from the understanding put forward in the third chapter of this thesis. On the analogy between 'communicative power' and 'public reason' see also Kenneth Baynes's attempt to link Habermas's 'communicative power' to Rawls's idea of public reason (*Democracy and the 'Rechtsstaat': Habermas's 'Faktizität und Geltung'* in White, Stephen K. *The Cambridge Companion to Habermas* Cambridge, Cambridge: Cambridge University Press, 1995, p. 206).

order reason is what makes the insulation between legal and moral reasons feasible⁴⁶.

The reason why legal reasons are systematically prior to moral reasons is the fact that they spring from a procedure that is guaranteed to mimic (or reproduce) the communicative power from which rationality itself (as opposed to the correctness of actions) stems. The authority of law derives from the structure of reason, rather than from any particular reason for action. If this is a fair interpretation of Habermas, the reason why legal reasons are prior is simply the fact that any reason that springs from unhindered public debate is bound to be the *best available reason* for action and to carry in itself all the authority of practical reason. The *structural* (or second-order) nature of communicative power's authority makes it unsuited to be weighed against rules of a *substantive* (first-order) nature. Here it is possible clearly to perceive the most relevant difference between the procedural conceptions of law put forward by Alexy and Habermas. Alexy has discourse presuppositions implying morally substantive reasons, which, in turn, justify the adoption of procedures that generate further binding norms (i.e., legal norms), while Habermas derives the authority of law straight from the structure of rationality.

However, the structural idea of communicative power would only be able to ground this insulation if a further fact is established, namely, that legislation is necessarily more efficient in channelling communicative power into administrative action than, say, non-legislative public debate. It has to be shown that the legislative institutions are necessarily at least as good as the best prepared reasoning agent at channelling the demands of reason (or, what amounts to the same, communicative power). If legislative debate is not more appropriate for conveying communicative power than any other sort of debate, there would be no reason to assign to its product (legal norms) priority over any other sort of reason for action.

Habermas's argument to establish that further premise takes the form of a justification for a particular division of labour that he proposes between 'weak' and 'strong' publics⁴⁷. Weak publics, which are located in civil society, are responsible for the *identification*, *interpretation*, and creative *presentation* of social problems. Argumentation by those publics

⁴⁶ The idea of splitting up reason into two levels is older than Kant's philosophy. A brief mapping of the evolution and alternatives to that conception of moral judgement can be found in Günther, Klaus *The Sense of Appropriateness: Application Discourses in Morality and Law* (Translated by John Farrell), Albany: State University of New York Press, 1993, p. 59 ff.

⁴⁷ A distinction that was originally introduced by Nancy Fraser in her Rethinking the Public Sphere: A Contribution for the Critique of Actually Existing Democracy in *Habermas and the Public Sphere*.

is not procedurally regulated and, as a result, it possesses an anarchic structure.⁴⁸ The competence for *decision-making*, on the other hand, is concentrated in the ‘strong’ publics which are effectively the institutionalised political system, notably, the legislative process. Weak and strong publics interact in a number of different ways, but the most relevant way of interaction for my purposes here is the exclusion of decision-making from the competence of weak publics. The reason why the division of labour is necessary is the fact that a condition for the weak public sphere to exist is that it ‘enjoys the support of a societal basis in which equal rights of citizenship have become socially effective.’⁴⁹ For those rights to be effective, Habermas believes that legitimate law must grant them protection⁵⁰. On the other hand, strong publics are not self-sufficient because they are not able effectively to identify, interpret and present either social problems or solutions for those social problems on their own.

Now is that enough to justify that the pure procedural value of legal reasons has systematic priority over moral reasons? The fundamental objection to the attempt to ground the absolute practical (moral-ethical) priority of the legislative in the concept of public reason (or communicative power) is the fact that there is no good reason to believe that the parliament is *always more likely* to appreciate all the reasons available in public communication than a clever well-intentioned agent or group of agents. After all, public reasons are reasons that are *publicly available*. If the clever well-intentioned agent sees himself as being as likely as the parliament to judge the rights and wrongs of the situation, the procedural value of legislation would not be able to ground absolute submission of his conceptions of what is right or wrong. If, on the other hand, it were true that the parliamentary body, at least under some conditions, is *always more likely* (or at least as likely) to reach the right solution than any other person/group of persons, it would be reasonable to accept that the division of labour between strong and weak reasoning publics can ground the absolute priority of legal reasons over moral reasons. Here, I believe, lies the main weakness of Habermas’s argument for the systematic priority of legal reasons over moral reasons.

A legitimate decision-making procedure would be one in which legislators should *always* be able to grasp and correctly judge (given the available information) all the arguments produced in a social group about how to resolve all the problems identified by members of the same

⁴⁸ Habermas, Jürgen *Between Facts and Norms*, cit., p. 307.

⁴⁹ Habermas, Jürgen *Between Facts and Norms*, cit., p. 308.

⁵⁰ See argument in chapter three about the need to protect public reason.

social group. If the procedure were not able to grant that, the legislators would not be able to ground the authority of their decisions in the second-order argument presented above. Now, which sort of procedure would be able to guarantee that legislators would always balance all the relevant reasons available according to the available criteria in the best possible way? The safest bet would be those procedures that include *substantive constraints* within their structure. In our case, one might say that a procedure is legitimate if, and only if, it succeeds in conveying communicative power. But those procedures are not so much unable to ground legislative authority as they are useless, for in order to know whether or not the legislator did balance all the available reasons in the most rational way according to the available reasons the agent would have to go through the process herself. The 'burden' would not be in any way relieved by legitimate legislation. Furthermore, the agent would eventually not be acting on the reasons given by the parliament, but on the right reasons she just discovered. Therefore, that sort of procedure is not available to Habermas either as a means to help the overburdened agent or as a means to ground law's authority over morals in formal contexts.

Which other sort of legislative procedure can guarantee that those in charge of public will-formation will necessarily get it as right as to any other subject in society? Habermas seems to have in mind procedures that have other sorts of substantive structural restrictions, namely, respect for rights and majority rule. But it is still not clear why it would be inconceivable that a procedure that incorporates an obligation to respect rights and whose dynamics of decision-making are a result of applying the principle of majority rule would never fail in particular instances to convey all the reasons and problems available in communicative power. Majority rule is particularly problematic in this respect. It seems at least feasible that a majority vote, even under the institutional constraints set up by the democratic principle might, sometimes, fail to provide the best *available* balance of the best *available* reasons. I am not here just stating the trivial truth that majority vote doesn't necessarily represent the best balance of reasons *tout court* (the balance that, presumably, would be achieved in an ideal-speech situation⁵¹). I am saying that there is no reason to believe that parliamentary institutions would always necessarily do the *best possible* job in rational opinion-formation. That would only be the case if 'respect for rights' is defined as being a substantive guarantee that conceives any

⁵¹ As an instance of Habermas's use of idealizations, notably his uses of ideal speeches and ideal communicative communities, see *A Theory of Communicative Action* (transl. by Thomas McCarthy) Boston: Beacon Press, 1985, v. 2, pp. 62-76

instance of parliamentary failure *by definition* as an instance of a violation of a right. But if the system of rights is so defined, it is effectively a check on the procedure's result by the criteria created by communicative power, in which case the argument of the last paragraph applies once more, and once more the kind of procedure in question would be able neither to help the overburdened agent nor to ground law's authority over morals in formal contexts.

What Habermas needs is an argument to prove that there is a *causal link* between a particular kind of procedure (say, a procedure limited by the obligation to respect rights and put in motion by majority rule) and the fact that legislators are effective in conveying communicative power. The difficulty in providing such an argument stems from the fact that it is supposed to ground a claim of *empirical necessity*. Indeed, Habermas does not provide such an argument⁵². Now, in the plausible hypothesis that such an argument cannot be provided, what follows for Habermas's attempt to insulate legal from moral reasons?

If the thesis that affirms a necessary causal connection between a particular kind of lawmaking procedure and the fact that legislators are effective in conveying communicative power cannot be made, it follows that there is *a possibility* that some problems and some reasons are not being taken into account by the parliament. If such a possibility exists, then the grounds one might have to believe that the parliament will *always* provide the best balance of available reasons in order to solve all the identified problems is fundamentally flawed. Parliamentary authority (and, derivatively, the authority of law) could not be a function of the fact that parliamentary lawmaking is *necessarily* the best available conduit for the power of reason. Under some conditions, the fact that legitimate parliamentary procedures are to some extent *likely* to get it right might be a prudential reason to obey the law, but the fact that those procedures are likely to get it right is not *itself* a reason for obeying the law. That would also depend on the subject's assessment of *how likely she (or someone else) is* to get it right in the particular circumstances. The power of reason (Habermas's communicative power) is a power to which no one particular person or institution have a privileged claim. The prudential assessment of all the competing opinion-holders' reasoning capacities is part of the moral assessment of the situation and, as such, it falls under the competence of all rational subjects.

⁵² I shall not discuss this empirical point here, but Emiliós Christodoulidis's arguments against the thesis that politics (the arena *par excellence* of public reason) can be exhausted in law (roughly what he calls the 'containment thesis') offer good evidence that there is something structural to social interaction that simply cannot be fully captured in the legal form. See Christodoulidis, Emiliós *Law and Reflexive Politics* Dordrecht: Kluwer Academic Publishers, 1998, *passim*.

If the empirical premise mentioned above cannot be proven and it all comes down to arguments about the likelihood of a person or group of persons to reach the right decision, Habermas's attempt to use second-order reasons in order to alienate an agent from her own rational decision-making process is neither an argument for law's *pure procedural* value nor an argument for law's *perfect procedural* value, but instead an argument for law's *imperfect procedural* value. Habermas's argument would be analogous to Raz's normal justification thesis and it would be as unable to ground the systematic priority of laws that result from legitimate decision-making processes for the same reasons that explain why the normal justification thesis is unable to do so. Since those reasons were presented in chapter four, there is no need to state them once again, but it is worth recalling the conclusion that sprang from those reasons: the bearing of second-order reasons (reasons that help decide about the rationality of reasons) on the case would also depend on the assessment of the bearing first-order reasons (reasons about what is the right thing to do) on the case.

There are, of course, moral reasons why one might sometimes be justified in accepting the parliament's decision as binding, even if one accepts that the discourses in parliament are not perfectly representative of the reasons available in the public forum (and, for that same reason, unable to convey all the communicative power generated in society). William Rehg has hinted at the existence of reasons to obey particular lawmaking procedures which are independent of the parliament's discursive capabilities⁵³. Indeed, Rehg argues, if those additional reasons didn't exist it would be difficult to build particular lawmaking procedures from the discourse principle, given the two very powerful idealisations which are contained in it⁵⁴. Many of those reasons do indeed exist. It might be said, for instance, that central authority facilitates social integration since it helps co-ordination by reducing social complexity, or that democratic lawmaking is intrinsically fair because it gives the same political power to each member of the society⁵⁵. But all those reasons are *first-order* moral reasons that, for the reasons presented in chapter three, cannot be systematically prior to any other moral reasons, with the result that they cannot ground the systematic priority of reasons created by a particular institutional procedure (such as legal reasons) over other moral reasons.

⁵³ Rehg, William Against Subordination: Morality, Discourse and Decision in the Legal Theory of Jürgen Habermas in Rosenfeld, Michel and Arato, Andrew *Habermas on Law and Democracy: Critical Exchanges* Berkeley: University of California Press, 1998, p.257-271.

⁵⁴ The two idealisations are that all affected should, first, agree and, second, that this agreement is reached on the basis of insight (See Rehg, William, Against Subordination, p. 260-1.

Let me briefly sum up the argument just presented. Habermas attempts to justify the separation between legal and moral reasons in such a way that each kind of reason is systematically prior in a particular sort of context (legal reasons in formal contexts and moral reasons in contexts of face-to-face interaction). His argumentative strategy is to found the separation in the rational authority of the parliament, which is structurally prior to moral reasons. But we saw that the success of this enterprise depends on justifying an empirical claim that a certain kind of lawmaking procedure *necessarily causes* the legislator effectively to take into account all the reasons available in society. Without an argument to ground such a claim, Habermas's justification for the procedural value of legal reasons would not be able to imply any sort of systematic priority. No argument is offered by Habermas which is able to justify such a thesis and it would seem that parliamentary procedures that involve majority rule would be especially difficult to justify.

⁵⁵ Rehg, William, Against Subordination, cit., p. 269-70.

The Theses

I now want to pull together the strings of my different arguments and I should start by putting forward the theses I wished to defend with the arguments above. Those theses relate in a number of ways, the most important of which is that they are both partial answers to the central problem with which I was concerned when I began to write this thesis, namely: what is the legitimate role of reasons in decision-making processes? What I want to ask, in other words, is *when* do I have to use reasons in order to decide what to do and *how* should I use them, particularly in contexts of public decision-making? My first thesis is that there are moral reasons that apply specifically to processes and strategies of *decision-making* and, more specifically, to the appropriateness of deciding what to do by means of reasoning. If that is correct it follows that it is not necessarily the case that ratiocination is always the best way to decide what to do. In order to prove my thesis, I showed in the first chapter which sorts of reasons could apply that justify (and even oblige) an agent not to reason in order to decide what to do. Those reasons are reasons that inform a moral judgement on the agent's *character*, that is to say, they inform a judgement on which sort of *moral person* an agent is. They only apply derivatively to *action*. The connection between the judgement of character and the judgement of action is evident if we concentrate on actions such as merciful actions whose performance requires that a disposition of character be excited (as I also tried to show in the first chapter). The modern conception of the human being as only an empty vessel essentially composed of reason and will is blind to the other morally relevant features we have*. If our only morally relevant features were effectively our reason and our will, all decision-making that is morally correct would be rational. By reasoning we would be asserting at every instance our most important moral (indeed, human) feature, namely, our reason. When the only method of decision-making is to reason, and the only virtue is to be rational, deliberation on the character loses its point. Not surprisingly, modern philosophers seem to have thought that the primary object of moral judgement is *action* and not *character*.

* Marilyn Friedman found in the critique to this sort of conception of the human the common ground between Communitarianism and Feminist Jurisprudence. See her Feminism and Modern Friendship: Dislocating the Community *Ethics* Issue 99, p.143-158.

Concepts such as mercy might help us to unearth a richer conception of the human which is, as it were, asleep underneath our modern prejudices. They help because they still bear witness to the fact that there are other morally relevant features in human character. If my first thesis is correct, the task ahead is to explain which role each sort of decision-making method is to play in the life of the good person. The arguments in chapters two to five aim at offering an answer to that question for the specific case of public agents.

To put it briefly, my second thesis is: decision-making by public agents must always be the result of comprehensive reasoning. Chapter two was designed to prove that public agents must always decide based on reasons. That means that the thesis according to which public decision-making should (or could, under normal circumstances) result from public agents' dispositions of character is false. Public agents should develop an inclination always to act on *reasons* and not merely on unreflective excitement of dispositions (although, as we saw in chapter one, private agents sometimes *must* not act based on rational reflection). But asserting that *comprehensive reasoning* is the required process of decision-making for agents acting in public contexts implies something else, to wit: public agents must not discriminate between kinds of reasons that can enter the weighing-up process and kinds of reasons that cannot enter that process. In the second chapter, I argued for the thesis that public agents must always decide based on reasons. In the last three chapters, I argued against the three most relevant attempts to show that some reasons should be excluded by kind from the decision-making process of public agents. Bearing my two targets in mind, let us now revisit some of the arguments presented above.

The argument to prove the first thesis

The first chapter above was dedicated to establishing the credentials of my first thesis. More specifically, it aimed at providing an account of moral judgement in which it would make sense to say that the processes through which moral decisions are brought about is morally relevant itself. In this account, moral judgement can be passed not only on actions, but also on people or, to be more precise, on people's characters. When one makes a moral judgement on the way in which an action was brought about, that moral judgement is expressing something about what kind of person the decision-maker is. One might be the kind of person whose inner disposition is to always decide what to do based on reasoning. Alternatively, one might be the kind of person who never acts on reasons, but who simply works as a *medium* through which

certain facts *cause* some consequences. The morally good character lies somewhere in between those two extremes. A moral agent is required sometimes to reason in order to decide what is the right thing to do; on other occasions, she might be required simply to 'let go', that is, to allow facts to cause a non-reflective reaction in her.

My strategy in presenting the argument that grounds those conclusions was to introduce a controversial moral concept that has given headaches to philosophers at least since the writings of St. Anselm, namely, 'mercy'. Mercy seemed to St. Anselm antithetical to justice. Others thought that mercy could not be truly distinguished from justice. It looked like mercy was either antithetical to, or impossible to distinguish from, justice. I claimed that the paradox is dispelled if the difference between justice and mercy is conceived as a difference between two different decision-making strategies, each of which would be required in certain situations from a morally good person. While mercy should be conceived as springing from inclinations (that is, allowing oneself to be a *medium* for a causal chain of events), justice required action that springs from reasons. While the discussion of mercy occupied a significant part of the chapter, my account of mercy in the first chapter is just an instrument to present my explanation of the sense in which moral reasons apply to the decision-making process through which an action was brought about. Acting mercifully and acting justly reflect two different and morally relevant aspects of someone's character, that is to say, two different inclinations. As *actions* they are mutually exclusive, that is to say, they cannot exist at the same time: one cannot be required to act on general reasons and, on the same occasion, act on no reasons at all (hence the paradox). As *aspects of someone's character*, however, they can be conceived as belonging to the same person at the same time. That, on a particular occasion, a moral agent is required to show one aspect of his character while, on a different occasion, she is required to show another aspect does not seem to be particularly problematic. (I suggest that perhaps the virtue that teaches which occasions require which aspect of one character to manifest itself is prudence.)

To sum up: decision-making processes bear witness to the person the agent is. Deciding one way or another shows how an agent reacts to the world. And judging characters is one, if not the only, business of morality.

The arguments for the second thesis

Having established that different contexts might require different aspects of a moral agent's

character to manifest itself and that, as a result, different forms of decision-making might be required from the moral agent, I started to deal with the problem of which sort of decision-making is morally required in one particular sort of context, namely, public decision-making. My first concern was to establish whether or not there is a general method or strategy of decision-making which is *morally* required from agents deciding in public contexts. In chapter two, I claimed that agents acting in public contexts have a moral obligation to decide the issues presented to them based on the *reasons* they believe to be applicable to the case at hand (and not on their dispositions to act). In a nutshell, the argument presented there runs as follows: first, it is assumed that reasoning brings about more certainty about what is the right thing to do; second, as we had seen in the first chapter, the value of personal self-improvement sometimes outweighs the value of acting based on opinions which are more likely to be correct (opinions reached through reasoning) and that explains why we are not always obliged to (and sometimes positively obliged not to) reason in order to decide morally; in contexts of public decision-making, however, public agents are submitted to a more stringent requirement of impartiality than agents acting in their private capacity, more specifically, they are not supposed to take personal interest into account in order to decide public matters. Giving precedence to one's own moral self-improvement goes against that extra requirement of impartiality. The conclusion is that the sort of reason that justifies the adoption of decision-making methods different from the decision-making method that can bring more certainty (that is, reasoning) do not apply to public contexts. Public agents, when acting in public contexts, are, therefore, obliged always to reason in order to decide.

But that is not enough to prove my second thesis. Recall that according to my second thesis, decision-making by public agents must always be the result of *comprehensive* reasoning. Comprehensive reasoning was defined as the reasoning in which the decision-maker weighs against one another all the reasons that are applicable to the case in order to decide what is it best to do. Reasons that cover the instant case *within their scope* cannot be rendered inapplicable to it because they are not the *kind* of reasons that an agent can take into consideration in a particular case. Now that is a very controversial claim. Indeed, three of the most important contemporary accounts of practical reasoning by public agents argue that some reasons should be excluded *by kind* from their reasoning (and two of them make the additional claim that private agents acting under the law must also exclude certain reasons by kind). Those theories are the neutralist public version of liberalism, Raz's account of the authority of the law and Habermas's justification for obeying the law, as stated in *Between*

Facts and Norms. I believe those three attempts to justify non-comprehensive reasoning do not succeed and I set off to refute each of them separately in the last three chapters of this thesis.

Of those attempts to justify non-comprehensive reasoning, only Raz's applies directly to decision-making processes, at least in my reading of his theory of legitimate authority. Raz's theory is about having reasons to decide to do something that might eventually turn out not to be the best possible action. In following reasons provided by legitimate authority, I am relying on the probability that adopting those reasons is more likely to bring me to the right action, but there is no guarantee that I will end up choosing the morally best action. The central question I ask in chapter four is whether or not Raz's attempt to justify a certain decision-making procedure implies that certain reasons are excluded *by kind* from the reasoning of those who make decisions under legitimate authority. I tried to prove that Raz's theory of legitimate authority cannot justify such an insulation. The fundamental reason why Raz's argument fails to justify the pre-emption of some reasons from the reasoning process is the fact that reasons of moral probability (as the normal justification thesis is) are sensitive to reasons that increase moral certainty. If I am absolutely sure that what the authority asks me to do is wrong, I will be inclined to believe that the probability that I will act correctly is greater if I follow my own advice than if I follow the authoritative directive. Against that objection a number of arguments could be raised (e.g. introducing a difference between clear and big mistakes or a difference between jurisdictional and other mistakes), but I tried to show that neither of them provides a good response to it. I also explored some alternative versions of the argument that ground insulation on authoritative directives, such as Soper's, and concluded that they also do not succeed. Finally, I offered an account of formal reasons that does not imply insulation between authoritative and substantive reasons; as a matter of fact, in my conception of formality, formal reasons are grounded (in a particular way) in substantive reasons. If my conception of formal reasons is correct, it is possible to think of formality as not so much as excluding comprehensive reasoning, but as implying it.

Neutralist public liberals, in contrast to Raz, do not explicitly undertake an investigation of the ethics of decision-making. However, their theory of the right action for public agents to perform implies a certain model of decision-making in which certain reasons for action shouldn't be given a place in public decision-making. Reasons for the right are the only reasons that should enter the process of weighing reasons by public agents, while reasons for the good should be excluded from public agents' decision-making processes. That means that,

if neutralist public liberals are right, the reasoning of public agents *should not* be comprehensive. That, as we've seen, is not only explicitly recognised by liberals such as Rawls, but is also a necessary upshot of neutralist public liberals' belief that public agents should be impartial between conceptions of the good. Various arguments were provided by liberals in order to explain why reasons for the good are to be excluded from public decision-making. In chapter three, I dealt with those which seemed more promising, namely the internal connection argument, the objectivity argument and the critical argument. The burden of those arguments is to provide reasons for some moral reasons to be excluded from practical decision-making. Given the difficulty of providing a justification for systematically excluding moral reasons from decision-making which is itself based on moral reasons (a difficulty made apparent by the argument I dubbed 'the argument of importance', originally put forward by Charles Taylor), all those arguments adopt an alternative strategy. Because liberals cannot provide a justification for the exclusion of moral reasons which is itself grounded on moral reasons, they end up moving away from morality to find reasons that are immune to moral challenge. The internal connection argument attempts to ground the priority of the right on a general feature of human action, namely, the fact that human action supposes choice. The objectivity argument tries to ground the priority of the right on epistemological reasons, to wit, the greatest certainty we have of reasons for the right. Finally, the critical argument attempts to ground the priority of reasons concerning the right on their greater rational credentials. I expect to have shown in chapter three why each of those arguments fail to justify non-comprehensive reasoning by public agents.

Yet another defence of non-comprehensive reasoning is provided by a version of discourse theory that has Habermas as the most prominent example. In this version of discourse theory, the systematic priority of some kinds of reasons over other kinds of reasons follows from the procedure through which some reasons are produced. Attaching value to reasons produced through a particular procedure does not seem to be remarkably problematic. Habermas's particular account of the value of reasons produced through democratic procedures, on the other hand, is. In his account, from a reasoning process through which all available moral, ethical and pragmatic reasons are channelled, a reason for action (a norm) that is invulnerable to those moral, ethical and pragmatic reasons must result. Legal reasons produced by democratic procedures are, as a result, insulated from plain moral reasons. His argumentative strategy is to ground this separation between legal and moral reasons in the rational authority of the parliament, which is prior to the rational authority of individuals and other sorts of

groups that can be found in society. But we saw that the success of this enterprise depends on justifying an *empirical* claim that a certain kind of lawmaking procedure *necessarily causes* the legislator effectively to take into account all the reasons available in society. Without an argument to ground such a claim, Habermas's justification for the procedural value of legal reasons would not be able to imply any sort of systematic priority, and comprehensive reasoning would still be required in order to assert the authority of the parliament *and its limits*. As I expect to have shown in chapter five, Habermas provides us with no good reason to believe that claim.

Having dealt with some attempts to argue that public (and sometimes even private) agents should not reason comprehensively, I expect to have effectively defended the thesis according to which decision-making by public agents must always be the result of *comprehensive reasoning*. More generally, I hope to have helped to find the proper place for reasoning in processes of decision-making, first by dispelling the misunderstandings that might make it seem that the role of reason is easy to find (chapters one and two) and, second, by arguing against three attempts to justify that reasoning by public agents should be somehow non-comprehensive.

As soon as I arrived in Edinburgh four years ago, I read a poem by T. S. Eliot, which Professor Bankowski showed to me. Two lines of that poem were partly responsible for the sort of project in which I got involved in writing this thesis (and which were previously used by Prof. Bankowski as the epigraph to one of his articles). That lines helped me to realise that there is more to the ethics of decision-making than simply learning what is the right thing to do. Having been in many senses the starting point of this thesis, I now find that they might help to end it:

The last temptation is the greatest treason

To do the right deed for the wrong reason

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